DCS's emphasis on supervisory structure is archaic and leads to empire building which is inefficient and ineffective and that DCS's decision to title change, rather than reallocate, him and Sylvia Sterne on February 15, 1982, was discriminatory and effectively demoted him and was done solely because Ms. Sterne did not qualify for her position. Mr. Vanderwall alleges that Civil Service Rule 13.10(d) is inherently discriminatory because the appeal does not go directly to the Commission. Mr. Vanderwall charges DCS with laxity in failing to watchdog DHHR and complains that the Civil Service Manual fails to contain any mechanisms whereby an employee can safely blow the whistle on his supervisors or DCS, that the Civil Service Rules favor and protect

superiors rather than employees and that the agency's legal resources are provided to supervisors. Mr. Vanderwall complains that there was a twenty-month delay in responding to his appeal dated March 22, 1982, wherein he challenged his allocation; that DCS selectively approves reallocations for those in favor and denies reallocations to those not in favor; that his SF-3 dated December 30, 1981, was altered by whiting out his supervisory responsibilities; that his supervisor's SF-3 dated December 30, 1981, was falsified; that his SF-3 dated November 29, 1983, was conspiratorially developed by his supervisors without his having had an opportunity to participate; that DCS is in cahoots with DHHR personnel and merely rubber stamps the decisions

of DHHR personnel; that he was pressured into signing his job description after it was developed by his supervisors and by representatives of DCS in a meeting on November 29, 1983, in which he was not invited to participate; that DCS totally disregarded the documents he submitted on and after September 20, 1983; that DCS refused to consider his duties between December 30, 1981, and the time when his duties were diminished; that DCS returned his SF-3 dated September 27, 1983, because his supervisor had indicated that "approximately 50% of the description is outdated" rather than having his supervisor explain her comment; that he was disciplined twice for making known his superiors' decisions to obstruct the submittal of a budget request, which

disciplinary actions were later rescinded.

Additionally, Mr. Vanderwall attaches as exhibits to his request for appeal/request for investigation his SF-3s dated December 30, 1981, and August 31, 1981, DHHR organizational charts, time and attendance records, and a document entitled "A Brief for My Appeal/Grievance." In the latter document, Mr. Vanderwall alleges that in 1981-82, a conspiracy occurred to exploit state government, to conceal information from him and to discriminate against him, to favor the promotion of an unqualified friend of DHHR, of DCS, and of the Louisiana State Senators. Mr. Vanderwall demands to know who whited out the supervisory responsibilities on his SF-3 dated

December 30, 1981; why a memo dated July 2, 1981, from the DHHR Personnel Administrator to DHHR Acting Assistant Secretary was concealed from the staff until November 24, 1981; why DHHR Acting Assistant Secretary gave top priority to his reallocation on November 16, 1981, when he knew on November 5, 1981, and possibly on July 2, 1981, that DCS intended to abolish the Planner series; why the Division of Records and Statistics was hastily created on December 4, 1981, giving William Barlow responsibility for the Division of Records and Statistics as well as the Division of Policy, Planning and Evaluation; why, if Mr. Barlow was the Director of the Division of Policy, Planning and Evaluation until March 15, 1982, was Sylvia Sterne paid to perform

that job as of December 4, 1981; why was Ms. Sterne's SF-3 dated December 30, 1981, falsified as to the number of employees she supervised; why did not DHHR or DCS question the whiting-out of his SF-3 and the falsification of Ms. Sterne's SF-3 as to supervisory responsibility; why did DCS title change Mr. Vanderwall's and Ms. Sterne's positions rather than reallocate them; why did DCS delay in responding to his appeal for reallocation dated March 22, 1982, until August 4, 1983; what two Senators used their influence; whether the merit system prefers evolutionary or revolutionary career progression; why Ms. Sterne, who has less than four years of state service, is at the 6th step and earns $29,664, and Mr. Vanderwall, who has 26 years of state service, is at the

10th step and earns $28,860; whether a Public Health Planner and Program Developer can be adequately developed by progression in the Planning Analyst series and be supervised by someone without related professional knowledge, skills, and experience; and whether there is a need for an impartial board to investigate the Office of Health Services and Environmental Quality (hereafter, OHSEQ).

Finally, Mr. Vanderwall attaches to his request for appeal/request for investigation a document entitled "Significant Events." In this section, Mr. Vanderwall alleges that DHHR-OHSEQ was taken over by persons who were forced out of the New Orleans Health Department by Mayor Morial; that on November 5, 1981, Mr. Barlow announced

that DCS had given interim approval to the Planning Analyst series and told Mr. Vanderwall to apply for a Planning Analyst V position and told Sylvia Sterne to apply for a lower level position; that Mr. Barlow claimed that he had just become aware of this decision, although DCS's memo was dated July 2, 1981; that Mr. Vanderwall threatened to sue everyone involved in this coverup; that the Acting Assistant Secretary issued a new DHHR-OHSEQ organizational chart on December 4, 1981, creating a new Division of Records and Statistics and giving Mr. Barlow the dual responsibility complained of above; that on December 30, 1981, the Deputy Assistant Secretary advised Mr. Vanderwall to accompany him to his office to sign an SF-3 for a Planning

Analyst V position; that on February 23, 1982, the Deputy Assistant Secretary announced that Sylvia Sterne was retitled to a Planning Analyst IV (sic) position and would be made the Director of the Division of Policy, Planning and Evaluation and no one was retitled to the V position; that on March 15, 1982, Ms. Sterne's appointment was officially announced and Mr. Vanderwall approached the Acting Assistant Secretary and complained about the appointment, contending that the Deputy Assistant Secretary favored Ms. Sterne too much. As relief, Mr. Vanderwall seeks a reallocation to an appropriate class such as Planning Analyst V.

On April 25, 1984, counsel for DCS filed a Request for Summary Disposition of the appeal wherein he argued that Mr.

Vanderwall had failed to specifically plead any facts which would support his conclusion that the Director of DCS discriminated against him or that the Director treated him any differently from other persons similarly situated and therefore had no right to appeal. As to the request for investigation, counsel for DCS argued that DCS either had undertaken an investigation of the charges and by the date of the hearing, DCS either would have filed charges with the Commission or would have notified Mr. Vanderwall that DCS would not file charges.

On June 7, 1984, Mr. Vanderwall filed a letter demanding a copy of the investigation report and asking that the argument on the Request for Summary Disposition be deferred until after he

had been given a copy of the investigation report. By letter dated June 15, 1984, the Director of DCS advised Mr. Vanderwall that pursuant to Civil Service Rule 15.9(c)3, the investigation report was confidential until it was produced at a public hearing and that because the request for appeal and the request for investigation were separate matters, the hearing on the Request for Summary Disposition of the appeal would be conducted as scheduled.

On June 22, 1984, Mr. Vanderwall filed another letter wherein he contended that after his appeal was filed, he obtained a copy of the classification report dated December 7, 1983, prepared by Larry Golden, a DCS technician, concerning Mr. Vanderwall's

request for reallocation. Mr. Vanderwall stated that he had become convinced that the Director's decision was discriminatory. Mr. Vanderwall contended that his position was selected as the benchmark for the Planning Analyst IV position and therefore, his allocation was predetermined and that had not DHHR whited out his original SF-3 as to his supervisory responsibility, his position would have been reallocated. Mr. Vanderwall complained that after DCS learned that DHHR had whited out a portion of his SF-3, DCS did nothing about this apparent violation of Civil Service Rule 14.1(j) and that DCS returned to him, without explanation, on June 14, 1984, the package of material he submitted in support of his request for

investigation. Mr. Vanderwall contended that DCS's decision to title change Ms. Sterne's position in 1981 was incorrect and that the Director's decision on December 13, 1982, as to Mr. Vanderwall's position was also incorrect because Mr. Vanderwall was the principal assistant to the Director of Policy, Planning and Development. Mr. Vanderwall asked that appellee's Request for Summary Disposition not prevent his being able to put on evidence as to wrongdoing and discrimination. The thrust of Mr. Vanderwall's argument is that had not DHHR deliberately diminished and obstructed his job, it would be worthy of a Planning Analyst V position.

A public hearing on the appeal, limited to the issue raised in the

Request for Summary Disposition, was held before the Commission on July 10, 1984, in Baton Rouge.

On August 8, 1984, Mr. Vanderwall filed a pleading entitled "postscript" wherein he contended that either DCS was duped by DHHR or it participated in or perpetuated or failed to correct a scheme to diminish his position and to enhance Ms. Sterne's position. In support of this conclusion, Mr. Vanderwall refers to the deliberate benchmarking of his position as a Planning Analyst IV, the whiting out of his position description; the drafting of another position description for him; the action to title change rather than reallocate him; the convenient reorganization of DHHR-OHSEQ central office on December 4, 1981; and the

secret reorganization of DHHR-OHSEQ Policy, Planning and Evaluation Section on February 5, 1982. Mr. Vanderwall referred to the language contained in the classification report prepared by Larry Golden, a DCS technician, which refers to two alternate reorganization plans, one with a principal assistant to the chief of the planning unit and one without and concluded that the February 5, 1982, reorganization was accomplished solely to diminish his position. Mr. Vanderwall contended that the need to create a distinct planning unit within DHHR-OHSEQ was false because it already had, since 1975, a centralized distinct planning unit which Mr. Vanderwall had designed and created and of which Mr. Vanderwall was the first employee other than its director. Mr. Vanderwall

complained that the unmonitored and uncontrolled use by DHHR of temporary and acting appointments of unqualified persons effectively circumvented the Civil Service Rules concerning promotions. Mr. Vanderwall complained that Ms. Sterne was appointed as Acting Director of the Policy, Planning and Evaluation Section, was later demoted to the position of Chief of the Program Evaluation Unit and then was reappointed as Director of the Policy, Planning and Evaluation Section following the December 4, 1981, reorganization of DHHR-OHSEQ central office. Mr. Vanderwall contended that these maneuvers were made so that it would not appear that DHHR-OHSEQ had a distinct planning unit and that the creation of the Planning Analyst series of classes

by DCS was concealed by DHHR to strategize Ms. Sterne's promotion. Mr. Vanderwall complained that the merit system does not adequately protect employees from their superiors' internal political manipulations and favors empire building and does not provide a mechanism whereby an employee can blow the whistle.

By an opinion rendered on September 26, 1984, the Commission concluded that Mr. Vanderwall had stated a basis for appeal, under Chapter 13 of the Civil Service Rules, as to certain allegations in support of his conclusion that the Civil Service rules have been violated, specifically, the following allegations:

1. that his position was obviously altered by white out fluid to delete his supervisory responsibilities;

2. that his supervisory

responsibilities were erroneously transferred to Ms. Sterne's job description dated December 30, 1981; therefore, that Ms. Sterne's job description was falsified;

3. that the Department of State Civil Service acted based on obviously falsified job descriptions;
4. that Ms. Sterne did not qualify for the position to which she was appointed in December 1981;
5. that between December 4, 1981, and March 15, 1982, Ms. Sterne was paid to perform duties which were actually assigned to William Barlow; and
6. that Ms. Sterne was title changed to Planning Analyst IV (VI-sic) on February 23, 1982, based on a false job description.

The Commission ordered that DHHR and Ms. Sylvia Sterne be added as parties to the appeal. The appeal was referred to a hearing on the merits, limited to a consideration of proof of the six above-listed allegations. The burden of proof, as to the facts, was placed on Mr. Vanderwall.

On October 25, 1984, the Secretary of DHHR and Ms. Sterne were mailed a complete copy of the record in the appeal.

By agenda dated October 26, 1984, the appeal was scheduled for hearing on December 4, 1984. On November 8, 1984, Mr. Vanderwall asked for a continuance of the hearing. In this letter, Mr. Vanderwall also contended that, as to his request for an investigation, Civil Service Rule 16.3(b) had been violated because a hearing had not been conducted within six months of Mr. Vanderwall's having filed his request for investigation. Mr. Vanderwall asked that the appeal hearing not be scheduled until after the hearing on the investigation was conducted.

By letter dated November 26, 1984,

counsel for DCS advised Mr. Vanderwall that the Director of DCS had declined to file charges with the Commission based on his complaint. Mr. Vanderwall was advised that pursuant to Civil Service Rule 16.3, he had a right to prosecute before the Commission the written charges he had filed that alleged a violation which occurred within one year of the date he filed those charges and that the Commission could consider charges relating to actions which occurred more than one year before the charges were filed.

On January 23, 1985, counsel for DCS filed a Request for Summary Disposition as to the investigation. Counsel argued that inasmuch as the same document which was submitted as a request for appeal was also submitted as a

request for investigation, the hearing on the investigation should be limited to the same charges to which the appeal had been limited. Counsel argued that the remaining charges lack specificity and that the additional charges filed by letters dated June 22, 1984 and August 8, 1984, also lack specificity. By letter dated January 29, 1985, the parties were advised that the Request for Summary Disposition would be considered at the outset of the hearing on the merits.

A public hearing was held before the State Civil Service Commission on February 5, 1985, and April 2, 1985, in Baton Rouge, Louisiana, for the purpose of hearing the appeal and to allow Mr. Vanderwall to prosecute the charges in the request for investigation. Based on the evidence presented, the Commission

makes the following findings.

PRELIMINARY MATTERS

At the outset of the hearing, counsel for DCS argued his Request for Summary Disposition of the investigation. Counsel argued that the hearing of the investigation should be limited to the six items to which the appeal had been limited because only those six allegations had been pleaded with sufficient specificity to enable respondent to prepare a defense. Counsel for DHHR presented a similar motion. The Chairman ruled that the appeal would be limited to the six allegations listed in the opinion rendered on September 26, 1984, but, as to the investigation, complainant could put on evidence as to all factual allegations contained in the complaint.

FINDINGS OF FACT

1. The Office of Health Services and Environmental Quality (hereafter, OHSEQ) is one of the main divisions of the Department of Health and Human Resources (hereafter, DHHR). OHSEQ is headed by an Assistant Secretary, who reports to the Secretary of DHHR. At all times pertinent hereto, Mr. Vanderwall functioned as a planner for OHSEQ. At all times pertinent hereto, someone in OHSEQ functioned as a program evaluator.

2. In April 1973, David Bruce was hired as a Planner III. His background was in engineering. At some point in time, OHSEQ created a position of Director of Program Development and Evaluation to advise the Assistant Secretary on all agency planning, policy

development and program evaluation. Mr. Bruce functioned in this capacity. This position was described to DCS as a new position (#1155-001) and was allocated to the class of Community Planning Program Coordinator effective August 11, 1978. While Mr. Bruce was the Director, he supervised Mr. Vanderwall, who functioned as a planner, and Stanley Brown, who functioned as a program evaluator (position #1714-002). Effective October 23, 1978, Mr. Brown became the State Registrar of Vital Records and position #1714-002 became vacant. On December 4, 1978, Mr. Bruce resigned.

3. After Mr. Bruce resigned, Joseph Kimbrell, who was then a Public Health Program Administrator III, was detailed to special duty as the Acting

Director of Program Development and Evaluation. This detail to special duty lasted from December 4, 1978, to March 3, 1979. Mr. Kimbrell was the last person to fill position #1155-001 when it was allocated to the class of Community Planning Program Coordinator.

4. On February 8, 1979, Sylvia S. Sterne was hired as a Federal Program Analyst II by Dr. J.T. Hamrick, the Acting Assistant Secretary. Her function was program evaluation. She was hired because by Executive Order dated December 6, 1978, the Governor mandated that each agency develop program evaluation techniques and OHSEQ was in the process of setting up an Evaluation Unit. Ms. Sterne was hired in a new position (#1714-003). By memorandum dated March 9, 1979, Dr.

Hamrick announced the establishment of the Evaluation Unit and named Ms. Sterne as the Director of the Unit.

5. OHSEQ had a problem with the allocation of the job which functioned as Director of Program Planning and Development (position #1155-001). Apparently, DCS had no better class to which to allocate the job than Community Planning Program Coordinator. The class specification for the class of Community Planning Program Coordinator envisioned urban planning and the minimum qualifications therefor involved education and experience in the area of urban, regional and community planning.

6. The position of Director of Program Development and Evaluation was a health and human resource planning position. OHSEQ had a position

(#1155-001) and needed this function performed. However, OHSEQ could not hire someone with health and human resource planning experience because that experience would not meet the minimum qualifications for the class of Community Planning Program Coordinator. For this reason, OHSEQ abandoned using position #1155-001 and did not request that it be funded. So, on paper, OHSEQ had a position which was vacant, unfunded, and was allocated to a class that was completely useless to OHSEQ. (Effective August 1, 1980, DCS abolished the class of Community Planning Program Coordinator.)

7. In September 1979, Mr. Kimbrell became the Deputy Assistant Secretary. Effective September 4, 1979, Dr. Hamrick designated Ms. Sterne as Acting Director

of the Program Planning and Evaluation Section. (Apparently, somewhere along the line, the name of the section had been changed.) While serving in this capacity, Ms. Sterne stayed in her former position (#1714-003) and remained a Federal Program Analyst II. In her capacity as Acting Director, Ms. Sterne supervised Mr. Vanderwall. Ms. Sterne became ill in July 1980, and William Barlow was designated Acting Director. While Mr. Barlow functioned in this capacity, he, too, stayed in his former position number and remained allocated to his former class, which was DHHR Executive Officer II. As Acting Director, Mr. Barlow was Mr. Vanderwall's supervisor.

8. While Mr. Barlow served as Acting Director of the Program Planning

and Evaluation Section, it was comprised of three components: 1) the Planning and Program Development Unit, which was headed by Mr. Vanderwall, a Health Planning Officer; 2) the Evaluation Unit, which was headed by Sylvia Sterne, a Federal Program Analyst II; and 3) the Management Systems Unit, which was headed by Jean Craig, a Public Health Administrator IV. The unit heads reported to Mr. Barlow and Mr. Barlow reported directly to the Assistant Secretary. Sometime between 1980 and April 1981, Dr. Harold Heitkamp replaced Dr. Hamrick as Acting Assistant Secretary.

9. While Mr. Barlow was Acting Director of Program Planning and Evaluation, Mr. Vanderwall was considered the chief planner because he

headed up the Planning Unit and was more senior than Catherine Lampard, the other planner in the unit. Mr. Vanderwall was responsible for developing a public health plan for OHSEQ. Development of this plan required assistance from thirty-five to forty programmatic managers and Mr. Vanderwall had to work closely with seven planners. Mr. Vanderwall's role was to get the information from the programmatic managers, compile it in a prescribed format, provide planning assistance as needed, and see to it that the plan was delivered to the printer.

10. Although Mr. Vanderwall was considered to be the chief planner, at no time pertinent hereto was Mr. Vanderwall considered the Assistant Director of the Program Planning and

Evaluation Section and at no time did he exercise any line supervision over the other units (Evaluation and Management Information) within that Section.

11. Between April 1981 and May 20, 1982, R.K. Banks was the Acting Assistant Secretary for OHSEQ. When Mr. Banks assumed office, OHSEQ was organized into Divisions and all the Division Directors reported directly to the Assistant Secretary. This involved the Assistant Secretary in day-to-day coordination of activities which left him little time for policy formulation. Additionally, Mr. Banks felt that Dr. Sarah Braud, the Health Deputy Assistant Secretary, had an ill-defined role and was underutilized. Mr. Banks wanted to reduce his span of control and to better utilize Dr. Braud. There was also a

problem in the Vital Records function. Mr. Banks felt that Vital Records needed a senior manager to provide oversight. So Mr. Banks began to reorganize OHSEQ.

12. Mr. Banks also felt that several positions were underallocated, including Mr. Vanderwall's and Ms. Sterne's positions. Mr. Banks directed that requests for reallocations be prepared. In order to request a reallocation, DCS had to be provided with current descriptions of the duties of the positions sought to be reallocated.

13. A job description for Mr. Vanderwall's position was prepared by Mr. Vanderwall and Mr. Barlow. This description was signed by Mr. Vanderwall on August 31, 1981, by Mr. Barlow on September 1, 1981, and by Mr. Banks on

October 22, 1981. On this job description, Mr. Vanderwall was described as being the chief planner for OHSEQ. This description indicates that Mr. Vanderwall's supervisor was Mr. Barlow, DHHR Executive Officer II. In the narrative portion of the description, Mr. Vanderwall is described as providing "professional supervision to seven (7) office planners and administrative supervision to two (2) planners." However, in the block designated for listing the names and titles of persons supervised, Mr. Vanderwall's job description lists only Catherine Lampard, Health Planning Officer, and the vacant Community Planning Program Coordinator position as his subordinates. The purpose for preparing this job description was to

request a reallocation of Mr. Vanderwall's position from Health Planning Officer to Planner IV.

14. A job description was also prepared for Ms. Sterne's position, describing her duties as the chief of the Evaluation Unit. The position description indicates that her supervisor was Mr. Barlow and that she supervised Sandja de Massas and Richard A. LeBarge, Federal Program Analysts. Ms. Sterne signed this job description on September 3, 1981; Mr. Barlow signed it and Mr. Banks signed it on October 20, 1981. The purpose for preparing this job description was to request that Ms. Sterne's position be reallocated to the class of Public Health Administrator III.

15. On November 16, 1981, both

Mr. Vanderwall's and Ms. Sterne's job descriptions were forwarded to DHHR's Bureau of Classification and Wage to be reviewed.

16. While all this paperwork for reallocations was being prepared, Mr. Banks was proceeding to reorganize OHSEQ. By memo dated November 16, 1981, the name of the Program Planning and Evaluation Section was changed to the Policy, Planning and Evaluation Section effective December 1, 1981. The name change was made to indicate that this section wsa also responsible for policy development.

17. By memo dated December 4, 1981, Mr. Banks announced a reorganization of OHSEQ. The Directors of the programmatic units were directed to report to Dr. Braud and the Directors

of administrative units were directed to report to Mr. Kimbrell. The creation of the Division of Records and Statistics was announced and William Barlow was directed to assume the responsibility of Division Director effective immediately. Mr. Banks thus reduced his span of control to three people--Dr. Braud, Mr. Kimbrell, and Dr. Neil, the head of Local Health Services.

18. Meanwhile, independently of OHSEQ's reorganization, DCS had initiated a study of all of the planning classes in the state. DCS discovered that there were a lot of people in the state who performed planning functions and they were allocated to about thirty different classes, depending on what kind of planning was being performed. DCS wanted to consolidate all of these

planning functions into a single series to be designated Planning Analyst I-VII. DCS initiated its study in January 1981 and audited fifty planning jobs throughout the state, including Mr. Vanderwall's and Ms. Lampard's positions. After the study was completed, the class specifications for the Planning Analyst series were prepared. In July 1981, the proposed class specifications were sent to all agencies which employed planners for their review and comment. By memorandum dated July 2, 1981, Harold Bennett, DHHR Personnel Administrator, sent the proposed specifications to Mr. Banks and advised him that this series would affect the class of Planner I-V, Health Planning Officer (Mr. Vanderwall's class) and other classes. There was no

indication that the new series would encompass the Federal Program Analyst classes (Ms. Sterne's class).

19. When Mr. Barlow signed Mr. Vanderwall's job description on September 1, 1981, he was not aware of the proposed Planning Analyst series. When Mr. Banks signed Mr. Vanderwall's job description on October 22, 1981, Mr. Banks was aware of the proposed new series, but did not know when or if the new series would be implemented, so he requested that Mr. Vanderwall's job be allocated to an existing class in the Planner series. Mr. Banks figured that if and when DCS implemented the Planning Analyst series, he could submit another description for Mr. Vanderwall's job so it could be allocated within the new series.

20. Meanwhile, back at DCS, the Planning Analyst series was created effective November 5, 1981. So by the time Mr. Vanderwall's job description reached DHHR's Bureau of Classification and Wage on November 16, 1981, the request for reallocation to Planner IV had become inappropriate. This request for reallocation was never forwarded to DCS.

21. When DCS created the new Planning Analyst series, it asked agencies with planning functions to submit new job descriptions so these positions could be allocated within the new series. By letter dated November 20, 1981, Mary Ann Manley, the Administrator for the Bureau of Classification and Wage for DHHR, advised Mr. Banks that DCS had given

interim approval to the establishment of the Planning Analyst series. Mr. Banks was asked to submit job descriptions for any existing planner positions and was advised that any planner positions not updated would be considered abolished.

22. In response to this request, another job description was prepared for Mr. Vanderwall's position. This description was originally identical to the August 31, 1981, job description and was signed by Mr. Vanderwall on December 30, 1981. When this job description was presented to Mr. Kimbrell for his signature, he did not agree with it and whited out and changed certain portions of the job description. As a result of the alterations, Mr. Vanderwall was described as supervising only Ms. Lampard; the reference to "professional

supervision to seven (7) office planners and administrative supervision to two (2) office planners" was eliminated; and Mr. Vanderwall's supervisor was shown as "Director, Policy, Planning and Evaluation" instead of William Barlow. Mr. Vanderwall was aware that Mr. Kimbrell had altered his job description and was shown the altered version on December 30, 1981.

23. The reason Mr. Kimbrell whited out portions of Mr. Vanderwall's job description was that he did not feel that it accurately reflected Mr. Vanderwall's job. Mr. Kimbrell felt that the vacant Community Planning Program Coordinator position no longer existed and even if it did, it would not have been supervised by Mr. Vanderwall, since that position had formerly been

used for the Director of the Section when the Director reported directly to the Assistant Secretary. Mr. Kimbrell knew that Mr. Barlow was no longer Mr. Vanderwall's supervisor since Mr. Barlow had already been assigned as Director of the Division of Records and Statistics, so Mr. Kimbrell indicated the working title of the position which would supervise Mr. Vanderwall. Finally, Mr. Kimbrell did not feel that Mr. Vanderwall supervised, in any capacity, the nine planners mentioned in the narrative portion of the job description. Mr. Kimbrell was later advised by his personnel office that he should not have used white out fluid to change the job description, but rather, should have used Section 15 of the job description form to express his

disagreements with the description.

24. While Mr. Vanderwall was working on the public health plan, he had to work closely with programmatic managers and all planners within OHSEQ. This was the basis for the statement in the narrative portion of Mr. Vanderwall's job description that he exercised professional and administrative supervision over nine planners. Mr. Kimbrell did not feel that Mr. Vanderwall's role with respect to these planners was supervisory, nor did this role fit DCS's definitions of supervision. Mr. Vanderwall himself testified that he knew DCS would not consider his relationship with the planners as supervisory and that this was the reason he did not list these planners by name and title in Item 11 on

the job description, where subordinates are to be listed.

25. Based on all of the evidence presented, the Commission finds, as a matter of fact, that Mr. Vanderwall's job as of December 31, 1981, was more accurately described after Mr. Kimbrell altered it than it was prior to these alterations.

26. After whiting out what he deemed to be inaccurate, Mr. Kimbrell signed Mr. Vanderwall's job description on January 4, 1982. Mr. Banks signed the description on January 5, 1982. This job description was used as the basis for requesting that Mr. Vanderwall's position be allocated to Planning Analyst V.

27. Meanwhile, Mr. Barlow, who had been a DHHR Executive Officer II,

updated his job description to indicate his duties as Director of the Division of Records and Statistics. This updated job description was submitted to DCS for reallocation. DCS allocated this position to the class of DHHR Executive Officer II. Thus, Mr. Barlow stayed at the same allocation despite a change in his duties. Mr. Barlow took his position (which was formerly used in OHSEQ in some administrative capacity) with him when he became the Director of Records and Statistics because there was no position for the new Directorship.

28. OHSEQ also prepared a new job description for Ms. Sterne. Ms. Sterne was still allocated to the class of Federal Program Analyst II, which is a journeyman program evaluator class. However, since September 4, 1979, Ms.

Sterne had been performing more responsible functions--as Chief of the Evaluation Unit, as Acting Chief of the Program Planning and Development Section, then again as Chief of the Evaluation Unit, then again as Acting Director of Policy, Planning and Evaluation since December 4, 1981. <There are comments on Ms. Sterne's September 3, 1981, job description which indicate that in May 1980, DCS had approved a request to reallocate Ms. Sterne to a Public Health Administrator IV position (apparently based on her function as Acting Director), but that OHSEQ was reorganized and Ms. Sterne was returned to her position as Chief of the Evaluation Unit before the reallocation was implemented.> OHSEQ believed that Ms. Sterne had not been adequately paid

for what she had been doing and sought to have her classification upgraded.

29. By this time, it had already been decided by Mr. Banks, Dr. Braud, and Mr. Kimbrell that Ms. Sterne was best suited to serve as the Director of Policy, Planning and Evaluation, particularly since the emphasis at this time was on program evaluation. So another job description for Ms. Sterne was prepared in anticipation of designating Ms. Sterne as the Director of the Policy, Planning and Evaluation Section. This job description shows Ms. Sterne's supervisor as being Mr. Kimbrell and shows Mr. Vanderwall, Ms. Lampard, and others as being Ms. Sterne's subordinates. In Item 14, the following comment was made: "A restructuring of the OHSEQ organization

on December 4, 1981, has left the Policy, Planning and Evaluation Section without a Chief. The position description remains the same. It is proposed that this vacancy be filled, and this appointment become effective on the date of approval of this reallocation." (Emphasis added.) In Item 1, which is the space to indicate the name of the employee in the job or "vacant" if the job is not filled, Sylvia Sterne's name is entered. This job description accurately described the duties to be performed by the Director of Policy, Planning and Evaluation. Ms. Sterne signed this job description on December 30, 1981, and Mr. Kimbrell signed it on January 4, 1982.

30. While it is clear that OHSEQ intended to make Ms. Sterne the Director

of Policy, Planning and Evaluation, there is a serious question as to whether, in December 1981, Ms. Sterne was actually performing all of the duties listed on the job description which she signed on December 30, 1981. On one hand, Mr. Banks testified that Mr. Kimbrell had authority over Policy, Planning and Evaluation and could have delegated his authority; Mr. Kimbrell testified that he did in fact delegate this authority to Ms. Sterne in December 1981; and Ms. Sterne confirmed that she had been designated as Acting Director. On the other hand, Mr. Banks also testified that he and Mr. Barlow had made an arrangement whereby Mr. Barlow would remain Director of Policy, Planning and Evaluation during the transition; Mr. Banks did not know if

Mr. Kimbrell had designated Ms. Sterne as Acting Director; Mr. Barlow and Mr. Vanderwall did not know that Ms. Sterne had been designated Acting Director; Mr. Barlow signed the time and attendance records for the Policy, Planning and Evaluation Section between December 4, 1981, and March 15, 1982; and Ms. Sterne did not begin signing the time and attendance records for the Policy, Planning and Evaluation Section until March 15, 1982. Based on the testimony presented and the comment made in Item 14 of Ms. Sterne's job description, the Commission concludes that in December 1981, Ms. Sterne was not actually fully responsible for all of the duties listed on her December 30, 1981, job description.

31. OHSEQ did not know whether

this position was technically a reallocation of Ms. Sterne's old position (#1714-003) or was a new position. For this reason, both the blocks "Reallocation" and "New Position" were checked. DHHR requested an allocation of the position to the class of DHHR Executive Officer I. At this time, DHHR assumed that DCS would allocate the position to one of its administrative classes.

32. Both Mr. Vanderwall's and Ms. Sterne's job descriptions were submitted to DCS for processing.

33. On February 5, 1982, officials of OHSEQ met with classification technicians of DCS to discuss how the Planning Analyst series would be implemented in light of the reorganization which had taken place.

Apparently, two possible organizational structures were discussed, one having an Assistant Director of Policy, Planning and Evaluation and one without such an Assistant. OHSEQ wanted all the unit heads to be at equal levels and to report to the Director, so OHSEQ elected not to establish a position for an Assistant Director. The February 5, 1982, meeting resulted in no change in OHSEQ's original intentions concerning its organizational structure.

34. DCS reviewed the job descriptions. DCS determines whether a position will be reallocated or title changed and then DCS directs the agency to prepare the paperwork to make the changes. By letter dated February 15, 1982, over the signature of Frank V. Reitzell, Chief of Classification and

Pay, DCS advised DHHR that the following title changes were to be made:

Mr. Vanderwall - Planning Analyst IV
Ms. Sterne - Planning Analyst VI

The letter also stated that position #1155-001 (formerly allocated as Community Planning Program Coordinator) would be allocated to the class of Planning Analyst IV because "the duties and responsibilities assigned to this position had changed to such an extent that it was deemed a new position."

35. Because the actions were title changes, under the provisions of Civil Service Rule 5.7, the incumbents of the positions were allowed to remain in their positions whether they qualified or not. For this reason, DCS was not called upon to determine whether either Mr. Vanderwall or Ms. Sterne met the minimum qualifications for the newly

created classes.

36. Mr. Vanderwall's title change was made retroactive to November 5, 1981, when interim approval had been given for the creation of the Planning Analyst series.

37. On March 15, 1982, Ms. Sterne was officially appointed as the Director of Policy, Planning and Evaluation based on Mr. Kimbrell's recommendation to Mr. Banks. The title change of Ms. Sterne's position was made effective December 4, 1981, when the organization was announced and was not made effective on November 5, 1981, when the rest of the title changes were effective for the Planning Analyst series.

38. When DCS initiates a class study, it audits representative jobs to determine how many different levels of

responsibility are being performed in a class series. After discerning what jobs are being performed, DCS develops proposed class specifications to distinguish between the various levels of work found and which will encompass all the jobs. In the Planning Analyst series, apparently DCS found that there were seven distinct levels of work being performed throughout the state. DCS found that Mr. Vanderwall's and Ms. Lampard's jobs were representative of the fourth level of responsibility and were good examples thereof. Therefore, Mr. Vanderwall's and Ms. Lampard's job were "benchmarked" for the Planning Analyst IV level and other planning jobs in the state were compared to these positions to determine if the other positions were equivalent to Mr.

Vanderwall's and Ms. Lampard's jobs.

39. The class specifications for the class of Planning Analyst IV indicate that the class was designed to encompass a position which served as a supervisor in a general field, an advanced journeyman in a complex field or a journeyman in statewide policy planning.

40. The specifications for the class of Planning Analyst V indicate that the class was designed to encompass a position which: 1) directed the planning activities of a major state agency in a general field; 2) supervised at least three surbordinate Planning Analysts in a complex field; 3) assisted in directing planning activities in a large planning unit in a major state agency in a complex field;

or 4) served as an advanced journeyman in statewide policy planning.

41. For allocation purposes, DCS considers only line supervision and professional supervision. If an employee has more seniority than an employee in the same classification, this is not considered supervision. For this reason, DCS did not consider Mr. Vanderwall's relation to Ms. Lampard as supervisory. For an employee to be considered a line supervisor, that employee must make assignments to subordinate personnel, must be accountable for the quality, quantity, and timeliness of the work performed and must direct the day-to-day activities of the subordinates. The concept of professional supervision is similar to line supervision except that the

professional supervisor gives guidance to subordinate staff rather than directs the activities of subordinates on a day-to-day basis. Mr. Vanderwall's working relationship with other planners in OHSEQ while he was working on the state health plan was not considered supervisory because Mr. Vanderwall was not accountable for their work and did not have the authority to direct or guide their activities.

42. Mr. Vanderwall's job was not allocated to the class of Planning Analyst V because he did not perform any of the functions envisioned by the class specification. He did not direct DHHR's planning functions, but rather worked in a small unit within OHSEQ of DHHR. At best, he supervised one employee whose allocation at all times pertinent hereto

was equal to his; therefore, he did not have the required supervisory responsibility to be allocated as a Planning Analyst V. Mr. Vanderwall did not serve as an assistant to the Director of the Policy, Planning and Evaluation Section, because OHSEQ chose not to organize the Section in that manner. Finally, Mr. Vanderwall did not work in the Office of Management and Finance of DHHR where statewide planning is done. Succinctly stated, the planning unit which Mr. Vanderwall headed (composed of himself and Ms. Lampard) was too small for its head to be allocated to the class of Planning Analyst V.

43. The minimum qualifications for the class of Planning Analyst VI are:

MINIMUM QUALIFICATION REQUIREMENTS

INCUMBENTS OF THESE POSITIONS WILL SPECIALIZE IN SPECIFIC FIELDS: WHEN FILLING THE VARIOUS POSITIONS, ONLY APPLICANTS WHO HAVE QUALIFYING EDUCATION OR EXPERIENCE WHICH IS NECESSARY FOR THE POSITION WILL BE CONSIDERED.

A baccalaureate degree in accounting, anthropology, architecture, business administration, management, computer science, counseling, economics, education, engineering, environmental science, geography, government, health science, history, landscape architecture, law, law enforcement, mental health, marketing, planning, political science, psychology,

public administration, social work, sociology, statistics, transportation, urban studies, or closely related fields plus five years of professional level experience in any of the above-listed fields, including one year at a level equivalent to Planning Analyst IV in the state service.

SUBSTITUTIONS

Additional qualifying experience or subprofessional experience in qualifying fields may be substituted for the required college training on a year-for-year basis.

Graduate work in qualifying fields may be substituted for one year of the required experience on

the basis of thirty semester hours for one year of experience.

A master's degree in qualifying fields may be substituted for two years of the required general experience.

A doctorate degree in qualifying fields may be substituted for three years of the required general experience. There is no substitution for the remaining general experience or the one year of experience equivalent to Planning Analyst IV in the state service.

44. There was some testimony indicating that Ms. Sterne's degrees are in English Literature. Although Ms. Sterne was present during this hearing and was a party to the proceedings, Mr.

Vanderwall failed to question her in detail concerning her qualifications for the position. Although Bill Rowe, the Chief of the Examining Division of DCS, was subpoenaed at Mr. Vanderwall's request and was present during the hearing, Mr. Vanderwall did not call him as a witness to inquire whether DCS would have found Ms. Sterne's qualifications sufficient to meet the minimum qualifications for the class of Planning Analyst VI.

45. Although Frank Reitzell, the then Chief of the Classification and Pay Division of DCS, was subpoenaed at Mr. Vanderwall's request and was present during the hearing, he was not asked why Ms. Sterne was title changed rather than reallocated, nor was he asked on what basis DCS title changed position

#1155-001 (formerly, Community Planning Program Coordinator), to the class of Planning Analyst IV.

46. No evidence of political interference in connection with Ms. Sterne's title change was presented.

47. After Mr. Vanderwall's letter of appeal/request for investigation was received by DCS, Herbert L. Sumrall, the Director, instructed Lou West to conduct an investigation of Mr. Vanderwall's complaints. Mr. West conducted an investigation and submitted a written report to the Director. By letter dated November 26, 1984, Mr. Vanderwall was advised that the Director had declined to file charges with the Commission, but that Mr. Vanderwall had the right to prosecute his charges before the State Civil Service Commission.

CONCLUSIONS OF LAW

A.

THE INVESTIGATION REPORT

Throughout the hearing, Mr. Vanderwall demanded that DCS produce the investigation report which it prepared as a result of Mr. Vanderwall's complaints. Civil Service Rule 16.1 provides as follows:

> 16.6 Filing of Charges.
>
> (a) Any person may file with the Director or the Commission written charges of a violation by any person of the Article or the Rules.
>
> (b) When the Director, in the exercise of the authority granted by him in Rule 3.1(1) hereof, has caused

investigation to be made of reported violation of the Article or the Rules or has reason to believe that there has been violation of the Article or the Rules he may, in addition to other actions authorized by the Article or these Rules, file written charges with the Commission and present his findings to the Commission at a public hearing in a proceeding directed against the persons under investigation.

In this matter, Mr. Vanderwall filed his charges pursuant to Civil

Service Rule 16.1(a). Pursuant to Civil Service Rule 3.1, the Director ordered an investigation into Mr. Vanderwall's charges.

When the Director conducts an investigation, all data collected in connection therewith is confidential other than that which is admitted into evidence at a public hearing. Civil Service Rule 15.9(b). The purpose of this Rule is to encourage persons who are witnesses to or who have some knowledge of a possible violation of the Civil Service Article or a Civil Service Rule to come forward and candidly discuss the matter with DCS. These records are kept confidential to guard against possible retaliation against the complainant by agency officials or employees who are charged with alleged

violations and also to protect the charged respondents from public disclosure of charges which are found to have been frivolous. If the Director elects to file charges based on the investigation report, the report then becomes part of the charges and loses its confidential status. On the other hand, if the Director elects not to file charges, the report remains confidential. In this case, the Director, in an exercise of the discretion granted him by Civil Service Rule 16.1(b), elected not to file charges. For these reasons, the Commission did not order DCS to make the investigation report available to Mr. Vanderwall.

THE ALLOCATION ISSUE

An employee's right to appeal the allocation of his position is provided by Civil Service Rule 13.10(d), which reads as follows:

> 13.10 Appeals to the Commission.
>
> An appeal may be made to this Commission by
>
> . . .
>
> (d) Any person in the Classified Service who shall have failed to obtain relief from an allocation or reallocation of a position to a class or by the Classification Plan or any change thereof after a written request

> for review thereof by the Director or his representative as provided in Rule 5.3 and who alleges that the Director's decision has been discriminatory.

In all appeals wherein discrimination is the basis, the burden of proof, as to the facts, is on the appellant. La. Const. Art. X, Sec. 8(B).

In the appeal, Mr. Vanderwall asserts that his allocation was discriminatory. To prove that an allocation is discriminatory, an appellant must prove, by a preponderance of evidence, that other persons performing essentially identical duties are allocated differently. In this case, Mr. Vanderwall put on no evidence

that any other person who headed a small planning unit composed of only two people was allocated to the class of Planning Analyst V or to any class other than Planning Analyst IV. Therefore, Mr. Vanderwall has failed to bear his burden of proving that his allocation was discriminatory.

In addition to the right of appeal provided by Civil Service Rule 13.10(d), an employee can appeal his allocation if that allocation is the result of a violation of the Civil Service Article or a Civil Service Rule. Such a right is encompassed by Civil Service Rule 13.10(c) which reads as follows:

13.10 Appeals to the Commission.

An appeal may be made to this Commission by

. . .

(c) Any person in the Classified Service who alleges that he has been deprived of any right, discriminated against, or adversely affected by the violation of any provision of the Article or of any Rule of this Commission.

In the appeal, Mr. Vanderwall contends that his allocation resulted from a violation of Civil Service Rule 14.1(j), in that his allocation was based on a falsified job description. Civil Service Rule 14.1(j) reads as follows:

14.1 Prohibited Activities.

. . .

(j) No person shall make any false statement,

> certificate, mark, rating, form or report with regard to any application, test, certification, personnel transaction, appointment or employment made under any provision of the Article, the Rules, or a regulation of the Department of Civil Service, or in any manner commit or attempt to commit any fraud preventing the impartial execution of the Article, Rules, and regulations.

Mr. Vanderwall has charged Mr. Kimbrell with violating this Rule and DCS with acting on an obviously falsified job

description.

As to this contention, Mr. Vanderwall has proved that his job description was altered. However, Mr. Vanderwall has failed to prove that after his job description was altered, the resulting description was false. To the contrary, the commission has found that Mr. Vanderwall's job description was more accurate after it was altered than before. As of December 31, 1981, Mr. Vanderwall did not supervise the Community Planning Program Coordinator position. That position was vacant, unfunded, and the class to which it had been formerly allocated had been abolished on August 1, 1980. As of December 31, 1981, it was known that William Barlow, who had been assigned as Director of the Division of Records and

Statistics as of December 4, 1981, would no longer be supervising Mr. Vanderwall and that whoever would be appointed as Director of Policy, Planning and Evaluation would. Finally, based on the evidence presented, the Commission has found that Mr. Vanderwall never supervised the planners mentioned in the narrative portion of his job description. For these reasons, the Commission concludes that although Mr. Vanderwall's job description was altered, it was not falsified and therefore, Mr. Kimbrell did not violate Civil Service Rule 14.1(j) by altering the job description. Likewise, because there was no falsification of the job description, Mr. Vanderwall has failed to prove that his allocation resulted from a violation of Civil Service Rule

14.1(j).

Mr. Vanderwall lodged numerous other complaints concerning his allocation, yet no evidence was presented on these complaints that will support a conclusion that the allocation of Mr. Vanderwall's position was discriminatory or that the Civil Service Article or any Civil Service Rule was violated. For example, Mr. Vanderwall disagreed with the placement of his job in the Planning Analyst series, yet he put on no evidence which indicated that his position sould have been allocated to any other series of classes. Mr. Vanderwall disagreed with the requirements that there be a certain level of supervisory responsibility for a position to be allocated to the class of Planning Analyst V. Mr. Vanderwall

put on no evidence to indicate that the supervisory requirements were discriminatory or were developed in violation of the Civil Service Article or any Civil Service Rule. Mr. Vanderwall complained that the allocation of his position was predetermined because it was used as a "benchmark" for the class of Planning Analyst IV. Mr. Vanderwall's job was chosen as a benchmark because it was a good representation of the fourth level of responsibility found in planning jobs throughout the state. Mr. Vanderwall put on no evidence to indicate that had some other job been selected as a benchmark, Mr. Vanderwall's position would have been allocated to the Planning Analyst V level. To the contrary, the evidence proponderates to

the effect that Mr. Vanderwall's job simply did not fall within the fifth level of responsibility and therefore could not have been allocated to the class of Planning Analyst V. The only way Mr. Vanderwall could have been allocated to the class of Planning Analyst V was if OHSEQ chose to use an organizational structure which had an Assistant Director of the Policy, Planning and Evaluation Section and if OHSEQ chose to assign this duty to Mr. Vanderwall. Neither the Civil Service Article nor any Civil Service Rule requires an agency to create a position it does not want or need solely to provide an employee an opportunity for advancement. Therefore, no evidence of a violation of either the Article or a Rule has been proved. Mr. Vanderwall

complained that DCS simply rubber stamped the wishes of DHHR personnel; however, the evidence presented was that DHHR asked for Mr. Vanderwall's job to be reallocated to Planning Analyst V, but DCS title changed that position to Planning Analyst IV and that DHHR asked that Ms. Sterne's job be reallocated to DHHR Executive Officer I, but DCS title changed Ms. Sterne's job to Planning Analyst VI. Thus, Mr. Vanderwall has failed to prove his charge of rubber stamping. Mr. Vanderwall complained that DCS should have allocated the jobs independently of DHHR or OHSEQ. Civil Service Rules 5.1 and 5.2 require DCS to consult the appointing authorities in the allocation process. Rather than proving a violation, Mr. Vanderwall proved that DCS complied with this Rule.

Although Mr. Vanderwall filed a litany of complaints, he failed to prove any violation of the Civil Service Article or of any Civil Service Rule or any discrimination which had any bearing on his allocation. The thrust of Mr. Vanderwall's complaints is that had not DCS, DHHR and OHSEQ acted improperly, his position would have been allocated to a higher class. This was not shown. The evidence presented clearly preponderates to the effect that Mr. Vanderwall's job was appropriately allocated to the class of Planning Analyst IV.

C.

THE TITLE CHANGE ISSUE

Mr. Vanderwall complained that DCS's decision to title change, rather than reallocate, his and Ms. Sterne's

positions was incorrect and was done solely to demote him and to promote Ms. Sterne to a position for which she was not qualified. Mr. Vanderwall also complained that DCS title changed the wrong position and should have title changed position #1155-001 rather than Ms. Sterne's position.

Civil Service Rule 1.40.1 defines title change as "...a change in the title of the class to which a position is allocated without change in the position's duty and responsibility content." Title changes are used when new class specifications are developed to describe existing jobs. Incumbents of positions which are title changed are allowed to remain in their positions whether or not they meet the minimum qualifications for the new class (Civil

Service Rule 5.7).

The Commission concludes that Mr. Vanderwall's position was properly title changed because his duties remained essentially unchanged. Both before and after the title change, Mr. Vanderwall was the most senior planner for OHSEQ and was the head of the Planning Unit within the Policy, Planning and Evaluation Section. Furthermore, the Commission concludes that Mr. Vanderwall was not demoted as a reuslt of this title change. A demotion is defined in Civil Service Rule 1.11 as "a change of a permanent or a probationary employee from a position of one class to a position of another class for which a lower minimum rate is prescribed." Prior to his title change, Mr. Vanderwall's allocation was Health

Planning Officer, which had a minimum pay rate of $1538 per month. After the title change, Mr. Vanderwall's allocation was Planning Analyst IV, which had a minimum pay rate of $1594 per month. Thus, Mr. Vanderwall was not demoted as a result of the title change. See also Frazier v. Department of State Civil Service, 449 So. 2d 95 (La. App. 1st Cir. 1984).

Although the Commission has found that there was nothing improper about Mr. Vanderwall's title change, the same cannot be said about Ms. Sterne's title change. Based on the evidence presented, the Commission concludes that Ms. Sterne's position should not have been title changed. First the position which was title changed was position #1714-003, which was the program

evaluation position into which Ms. Sterne was initially hired and which was allocated as a Federal Program Analyst II. The duties of a journeyman program evaluator are drastically different from the duties of the Director of the Policy, Planning and Evaluation Section. For this reason, position #1714-003 should not have been title changed. Second, Ms. Sterne was not an incumbent of the job of Director of Policy, Planning and Evaluation as of December 31, 1981. She was assigned some of these duties on an acting basis, but had not been officially placed in that position by promotion, appointment, detail, or otherwise as of December 31, 1981. That Ms. Sterne was not an incumbent of this position is blatantly obvious from her December 31, 1981, job

description, particularly Section 14 thereof, which essentially states that the position was vacant and OHSEQ wanted to appoint Ms. Sterne to that vacant position. Because Ms. Sterne was not an incumbent of the position, she was not eligible to be title changed without meeting the minimum qualifications for the new class. Third, the position which DCS title changed (#1714-003) was not the position for the Director of Policy, Planning and Evaluation. The only position which had ever been used as the Director of that Section was position #1155-001. Therefore, the only position which could have been title changed to Planning Analyst VI was position #1155-001. For the foregoing reasons, the Commission concludes that Mr. Vanderwall has proved that DCS

violated the Civil Service Rules concerning Ms. Sterne's title change. The Commission would order that disciplinary action be taken against the person who was responsible for this error; however, Mr. Vanderwall did not put on any evidence to enable the Commission to determine who that person was. There are several sets of initials on the job descriptions. While it would appear that Larry Golden and Thomas Smythe determiend that the job should be allocated as a Planning Analyst VI, there is no indication on the job description as to who made the decision that the transaction should be a title change rather than some other type of transaction. Frank Reitzell, the then Chief of the Classification and Pay Division of DCS, signed the letter

ordering the title change and as Division Chief, might be said to be ultimately responsible for the decisions of that Division. However, even if Mr. Reitzell is presumed to have been ultimately responsible for the decision, Mr. Reitzell has retired from state service and therefore is not subject to any disciplinary action. Mr. Reitzell was subpoenaed to appear at the hearing at Mr. Vanderwall's request and was in fact present during the hearing on April 2, 1985. Certainly, Mr. Reitzell would have been in a position to identify who handled the transaction and whose responsibility it was to determine which position, if any, should have been title changed and whether the position was incumbered; however, Mr. Vanderwall did not even call Mr. Reitzell as a witness.

Because Mr. Vanderwall has failed to show who was responsible for the improper title change, no disciplinary action against anyone at DCS can be ordered.

While Mr. Vanderwall has proved that Ms. Sterne should not have been title changed into the position of Director of Policy, Planning and Evaluation and therefore would have had to have met the minimum qualifications for the class of Planning Analyst VI, Mr. Vanderwall failed to prove that Ms. Sterne did not actually meet those qualifications. Ms. Sterne was a party to the appeal and Mr. Vanderwall could have cross-examined her in detail concerning her qualifications. Mr. Vanderwall did not. Bill Rowe, the Chief of Examining for DCS, was

subpoenaed as a witness at Mr. Vanderwall's request and was present during the hearing. Mr. Vanderwall could have examined Mr. Rowe as to whether Ms. Sterne would have been considered qualified. Yet, Mr. Vanderwall did not even call Mr. Rowe as a witness. The Commission cannot conclude, based on the evidence presented, that Ms. Sterne did not qualify for the position because Mr. Vanderwall did not bear his burden of proof in this regard.

Mr. Vanderwall essentially contended that DCS deliberately title changed Ms. Sterne's position because she was not qualified to be placed in the position in any other manner. As noted above, Mr. Vanderwall failed to prove that Ms. Sterne did not qualify

for the position. additionally, Mr. Vanderwall put on no evidence whatsoever to indicate why the position was title changed. For these reasons, there is insufficient evidence to enable the Commission to conclude that DCS deliberately allowed Ms. Sterne to be placed in a position for which she did not qualify.

Mr. Vanderwall contended that OHSEQ deliberately misled DCS and falsified Ms. Sterne's job description so she would be promoted to a position for which she did not qualify. The evidence indicates that OHSEQ very clearly stated its intentions on the job description itself--that the position was vacant and they wanted to appoint Ms. Sterne to it. OHSEQ also indicated on the job description that they did not know

whether the position would constitute a reallocation or a new position. Finally, OHSEQ did not even ask for a title change to Planning Analyst IV--they asked for an allocation or a reallocation to DHHR Executive Officer I. Had OHSEQ been guilty of the conspiracies alleged by Mr. Vanderwall, it certainly could have done a better job of camouflaging its intentions. OHSEQ wanted to see Ms. Sterne paid higher. For two years, she had been shuffled round, had been performing more responsible work than her allocation suggested and was not being paid for it. Certainly, it is not a violation of any merit principle or any Civil Service Rule to try to insure that an employee is appropriately paid for what she does. OHSEQ very candidly announced its

intentions for Ms. Sterne on her job description but someone at DCS misinterpreted it. For the foregoing reasons, the Commission concludes that Mr. Vanderwall has failed to prove any violation of the Civil Service Article or any Civil Service Rule by OHSEQ. Therefore, no disciplinary action against any employee of OHSEQ is warranted.

D.

RELIEF

Although Mr. Vanderwall has proved that Ms. Sterne's title change was in violation of the Civil Service Rules, this does not entitle Mr. Vanderwall to the relief he seeks--a reallocation of his positoin to a Planning Analyst V position or to some other position which he feels is commensurate with his

duties. Even had the allocation of the position of Director of Policy, Planning and Evaluation been properly handled--either by title changing position #1155-001 or by allocating the position as a vacant new position--there was no evidence presented which indicates that Mr. Vanderwall would have been promoted to the position of Director or that Ms. Sterne could not have been. The Commission has concluded that Mr. Vanderwall's job was properly allocated. The fact that Ms. Sterne's title change was improper does not in any way affect the propriety of Mr. Vanderwall's allocation and does not entitle Mr. Vanderwall to a higher allocation.

For the foregoing reasons, the appeal is denied and no disciplinary

action is ordered as a result of the investigation.

Pursuant to Civil Service Rule 13.27, Mr. Vanderwall is ordered to pay witness fees to the following persons who are no longer employed by the state and who were subpoenaed at Mr. Vanderwall's request: Frank Reitzell - #13.00 as a witness fee and $69.44 for mileage; David Bruce - $13.00 as a witness fee and $28.80 for mileage; and Bickham Pardue - $13.00 as a witness fee and $23.36 for mileage.

s/ James R. Smith
James R. Smith, Chairman

s/ Marshall J. Ryals
Marshall J. Ryals,
Vice-Chairman

s/ Edwin C. Harbuck
Edwin C. Harbuck, Member

s/ James A. Smith
James A. Smith, Member

s/ Dianne C. Troullier
Dianne C. Troullier, Member

Commissioners A.J. Capritto and David D. Duggins were absent and do not participate.

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

WILLIAM VANDERWALL	CIVIL ACTION
VERSUS	NO. 86-525
MS. CONSTANCE HORNER, ET AL	SECTION "E"

ORDER AND REASONS

Plaintiff brings this action against various employees of the state and federal government. The plaintiff alleges that his demotion (and the promotion of others) during his employ at the Louisiana Department of Health and Human Resources was the result of a conspiracy of the defendants, whom he believes deprived him of his constitutional rights under the federal and state constitutions. Two of the defendants have now responded to the

EDITOR'S NOTE

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Supreme Court, U.S.
FILED
NOV 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-952

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

WILLIAM R. VANDERWALL, Petitioner
v.
CONSTANCE HORNER, et al, Respondents

PETITION FOR A WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Of Counsel:

MR. ROBERT BOLAND
Louisiana State
Civil Service
5700 Florida Blvd.
Baton Rouge, LA
70809
(504)925-1978

MR. ARTHUR FINN
Louisiana Atty.
General's Office
234 Loyola Ave.
New Orleans, LA
70112
(504)568-5575

WILLIAM R. VANDERWALL
6645 West End Blvd.
New Orleans, LA
70124
(504)486-4672

IN PROPER PERSON,
Petitioner

MR. MARK GALLINGHOUSE, U.S. ATTORNEY
500 Camp Street, New Orleans, LA 70112
(504)589-2921

November 6, 1987

QUESTIONS PRESENTED

Issue 1. As a matter of extreme public importance, does, as exposed herein, the Civil Service Department-Commission of the State of Louisiana, and possibly throughout the Federal, State, and local government(s), itself, operate its own uniquely discriminatory, unconstitutional patronage-spoils system--by means of "grandfathering," "Acting," "blanketing," or "title-changing" the unqualified/incompetent but favored person into a higher classification, pay, or position of decision-making authority for which he could not otherwise qualify/compete, thus circumventing what the U.S. Congress established, namely the Civil Service-Merit personnel system whose mission it is to qualify and protect,

with equity, all classified governmental employees.

Issue 2. Did the State and Federal Courts deny this whistleblower-petitioner's right, as per 42 USC 1981, "to present evidence" of very serious public wrongdoing (including conspiracies, collusion, fraud, concealment-falsification-duplication of existing positions/agency structure-functions, grand larceny, contempt of court, i.e. defiance of mandamus, injury of a public document, and numerous denials of due process and equal protection) and to be protected from such wrongdoing as derived from 42 USC 1983 and 1985, the Fifth and the Fourteenth Amendments, Congressional Act: 42 USC 4701 and 4721, and the Federal regulatory body, Office of

Personnel Management, all of which were instituted as protection for the individual/governmental employee?

Substantive Constitutional challenges as quoted verbatim from the petitioner's Brief, dated 10-17-86, to the U.S. Court of Appeals for the Fifth Circuit:

1. In this case, discriminatory personnel practice treated both parties the **same** rather than the traditional **"treated differently."**

2. Louisiana's State Civil Service System (should have read Commission) has no separation of powers, namely, legislative, executive, and judicial.

3. The Federal Office of Personnel Management's new policy of "self-certification" is contrary to Congressional intent "to strengthen"

State Merit Personnel systems and is therefore negligent to the protection of the employee's constitutional rights as per Merit Principle (5).

4. The Louisiana State Civil Service's condonation of the whiting out/falsifying of a public personnel document is not Constitutional Due Process.

5. Louisiana State Civil Service's current practice of temporary but potentially everlasting "Acting" appointments of unqualified persons is not Due Process of competition in Merit Systems.

6. In disputes between one State employee versus other State employees/ officials, the State should not provide legal assistance only to one side.

No.

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Of Counsel:

MR. ROBERT BOLAND
Louisiana State
Civil Service
5700 Florida Blvd.
Baton Rouge, LA
70809
(504)925-1978

WILLIAM R. VANDERWALL
6645 West End Blvd.
New Orleans, LA
70124
(504)486-4672

IN PROPER PERSON,
Petitioner

MR. ARTHUR FINN
Louisiana Atty.
General's Office
234 Loyola Ave.
New Orleans, LA
70112
(504)568-5575

MR. MARK GALLINGHOUSE, U.S. ATTORNEY
500 Camp Street, New Orleans, LA 70112
(504)589-2921

November 6, 1987

LIST OF PARTIES

The parties to the proceedings below were the petitioner, William R. VAnderwall and the repoondents as follows;

CONSTANCE HORNER, not a wrongdoer, Director, Federal Office of Personnel Mgt.

JAMES R. SMITH, Chairman, Louisiana State Civil Service Commission

HERB SUMRALL, Director, Louisiana Depart. of State Civil Service and Secretary of the Louisiana State Civil Service Comm.

FRANK REITZEL, former Chief, Division of Classification and Pay, Louisiana State Department of Civil Service

ROBERT BOLAND, Chief Attorney, Louisiana State Civil Service Dept.-Commission

FRANK PEREZ, Attorney, La. Dept. of Health and Human Resources (DHHR)

JOSEPH KIMBRELL, Deputy Assisstant Secty. DHHR-Office of Health Services and Environmental (Louisiana's Public Health Agency) and principal wrongdoer

SYLVIA STERNE, friend and former co-worker of Mr.Kimbrell and thus the favored employee. However, she is considered to be a victim than a defendant.

ARTHUR FINN, Attorney, La.Atty. Gen. Off. now the defender of all the above except **HORNER AND STERNE**

MARK GALLINGHOUSE, U.S. Attorney, defender of **CONSTANCE HORNER**

WILLIAM J. GUSTE, La. Attorney General

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IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1987

WILLIAM VANDERWALL
Petitioner

VERSUS

MS. CONSTANCE HORNER,
ET AL
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE

FIFTH CIRCUIT

The Petitioner, William R. Vanderwall, respectfully prays that a writ of certiorari issue to review the judgments and opinions of the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit entered in the above proceeding

on August 10, 1987,

OPINIONS BELOW

Appendix has three unpublished opinions.

JURISDICTION

1. Extreme public importance because this litigation is also an expose' of the startling fact that Louisiana's State Civil Service Department-Commission, itself, operates, with supportive criminal acts and without internal/external controls, its own patronage-spoils system which "it was intended to prohibit." It also

reflects this Petitioner's failure to present evidence of those facts in State and Federal Courts towards reform.

2. Final Federal Litigation (invoked under 42 USC 1983 and the Fifth and Fourteenth Amendments in the District Court of Eastern Louisiana which dismissed all charges of public wrongdoing and all defendants) by a three-judge panel from the Federal Court of Appeals, Fifth Circuit which, on August 10, 1987, "Denied" Petitioner's "Request for Panel Rehearing." The U.S. Supreme Court's jurisdiction is per Chapter 81, Section 1254 (1).

3.

The opinion of the Louisiana State Civil Service Commission, whose Civil Service Rule 5.7 is claimed to have the same force of law as a State Statute and to be uniquely discriminatory and thus repugnant to the U.S. Constitution. The United States Supreme Court's Jurisdiction is Chapter 81, Section 1257.

STATUTES/CONSTITUTIONS INVOLVED

The most important constitutional challenge is Louisiana's unique discriminatory practice: of being treated the same rather than differently, as per: State Civil Service Rule 13.11(d).4, which emphasizes "being treated differently" as the basis for appeals as per:

> (d) Where discrimination is alleged to be a basis for appeal...The types of facts which must be included are:
>
> 4. The names of other persons treated differently and the dates the different treatment occurred. (Underlines mine.)

State Civil Service Rule 5.7, Title Changes (as interpreted and misused by the Louisiana State Civil Service Department-Commission) which emphasized **"being treated the same,"** as quoted from its opinion, dated October 7, 1985 (see Item 35):

> Because the actions were title changes, under the provisions of Civil Service Rule 5.7, the incumbents were allowed to remain in their positions whether they qualified or not. For this reason, DCS was not called upon to determine whether either Mr. Vanderwall or Ms. Sterne met the **minimum qualifications** for the newly-created classes (i.e., Planning Analysts).

It is precisely the above-cited phrases:

"Whether they qualified or not" and "DCS was not called upon to determine whether Mr. Vanderwall or Ms. Sterne met the minimum qualifications for the (NOTE:) newly-created classes" that the Petitioner holds (explanation on pg. 21) contrary to:

1) U.S. Constitutional Amendments V and XIV.

2) Louisiana Constitution, Art. I, Section 2, Due Process:

3) The Louisiana Constitution, Art. X, Civil Service, Part I, Section 30, Oath of Office reads:

> I will support the Constitution and laws of the United States and the Constitution and laws of this State and that I will truthfully and impartially discharge and perform all duties incumbent upon me....

4) The Louisiana Constitution, Art X, Section 7, Civil Service:

Appointments/Promotions reads:

> Permanent appointments and promotions in the classified State and City Service shall be made only after certification by the appropriate department of Civil Service under a general system based upon merit, efficiency, fitness and length of service ascertained by examination, which **so far as practical, shall be competitive.** (Underlines mine.)

5) The Louisiana Supreme Court Ruling on December 13, 1976, in the case of John L. Hoppe v. City of Shreveport, LA, 340 So. 2nd, 1314 Louisiana Supreme Court, 1976, which states, in effect:

> When an entirely new position is created within the classified service, no permanent appointment can be made to it except in accordance with examination and certification procedures set forth by law. (Underlines mine).

6) President Reagan's Executive Order 12372 and the Federal Office of Personnel Management deregulation of State Merit Systems.

7) Louisiana R.S. 13.5801.1 (quoted on pages E 19) which requires Louisiana's Attorney General to defend any State employee/official sued under 42 USC 1983 unless they are wrongdoers.

Therefore, the major controversy before this Court is whether Louisiana State Civil Service's unique application of its Civil Service Rule 5.7 is, among other things, "permissible" as ruled by Federal District Judge or does it (as evidenced later):

. provide for clever, unique personal discrimination?

. circumvent constitutionally

required "if at all practical" competition/certification amongst all new and old incumbents of all new and old positions?

- deny the victims of their constitutional right to Due Process and Equal Protection?
- establish as per Bishop v. Wood, 96 S. Ct. 274, 280 (1976) "a claim that the public employer was motivated by desire to curtail or penalize the exercise of an employee's constitutionally protected rights"?
- establish substantive Constitutional challenges and therefore appealable issues to this Court and, above all,

contribute to problems of extreme importance to the public?

STATEMENT OF THE CASE

Petitioner, henceforth whistleblower, in 1984 retired from 27 years of classified Louisiana State Civil Service during which time: 1) he served as Director of Louisiana's Medicaid program, and 2) had often witnessed public wrongdoing involving Louisiana's State Civil Service. Accordingly, when he himself became a direct victim of that wrongdoing, he decided to blow the whistle towards reform--especially after Louisiana's well-respected, non-partisan Public Affairs Research Council (PAR), in early 1981 reported on its survey of "State Workers' Complaints." This on-target

study indicated: that Louisiana's State Civil Service System was ridden with "favoritism it was intended to prohibit"; that competent and incompetent employees were "treated the same"; that "advancement too often depends on political connections rather than merit and Civil Service scores as prescribed by law"; that "Both findings warrant further exploration by the State Civil Service Commission; and that "As for perceptions of political favoritism in promotions, if they are accurate, <u>such favoritism will wreck the Civil Service System and return the old spoils system to state government if it is not brought under control."</u> On December 1, 1981, PAR recommended Civil Service reform, changes in Louisiana's Constitution and more accountability

After State Civil Service, on February 15, 1982, Title Changed rather than competitively Reallocated, both his and a Ms. Sylvia Sterne's positions and, on a permanent basis, promoted-appointed her from a GS-24 to a fantastic GS-35 level classification, i.e., Planning Analyst VI, increased her monthly salary $600 rather than the usual $50, and reappointed her, this time officially, as Director of the Louisiana Public Health Agency's critical policy, Planning and Evaluation Section (PPES) despite the fact that she had less than three years State Civil Service and a non-medical/Public Health-related degree in English Literature, this whistleblower, on March 23, 1982, protested to the Louisiana State Civil

Service Commission, henceforth Commission, her promotion **"under the guise of a Title Change,"** and appealed for a more appropriate classification of his position which then served as both Chief Public Health Planner and Program Developer. When the Commission "misfiled" this protest-appeal for 15 months, the whistleblower's second appeal, on January 10, 1984, requested that it investigate serious wrongdoing within and between the State Civil Service Department and Louisiana's Public Health Agency.

After the Director of State Civil Service, Mr. Sumrall, wrote, in November 1984, that the Commission's investigation found no wrongdoing and that its report could not be made public despite a Civil Service Rule to do so

within six months, the whistleblower: first obtained, on February 1, 1985, a State Court approved Mandamus--which the Commission has defied to this day in October 1987. Secondly, the whistleblower, on February 5, 1985, and on April 2, 1986, before the Commission, investigated-prosecuted his own charges and so produced highly revealing and perjured testimony. On October 7, 1985, the Commission issued its 21-page, single-spaced OPINION, which denied the whistleblower's appeal (which then progressed through State litigation), but because of the evidence presented, necessarily acknowledged most of the alleged wrongdoing (none of which to this day in October 1987 has been corrected), especially State Civil Service Mr. Frank Reitzel's "violation

of Civil Service Rules" when he, on February 15, 1982, Title Changed the wrong position, namely that of Ms. Sterne, rather than position #1155-001. Note then the explicit quotation from the Commission's OPINION as follows:

> Based on the evidence presented, the Commission concludes that Ms. Sterne's position should not have been title changed. First, the position which was title changed was position #1714-003, which was the program evaluation position into which Ms. Sterne was initially hired....The duties of a journeyman program evaluator are drastically different from the duties of the Director of the Policy, Planning and Evaluation Section. For this reason, position #1714-003 should not have been title changed. Second, Ms. Sterne was not an incumbent of the job of Director of Policy, Planning and Evaluation as of December 31, 1981. She was assigned some of these duties on an acting basis, but had not been officially placed in that

position by promotion, appointment, detail or otherwise as of December 31, 1981. That Ms. Sterne was not an incumbent of this position is blatantly obvious from her December 31, 1981, job description, particularly Section 14 thereof, which essentially states that the position was vacant and OHSEQ (Louisiana's Public Health Agency) wanted to appoint Ms. Sterne to that vacant position. Because Ms. Sterne was not an incumbent of the position, she was not eligible to be title changed without meeting the minimum qualifications for the new class. Third, the position which DCS title changed (#1714-003) was not the position for the Director of Policy, Planning and Evaluation. The only position which had ever been used as a Director of that Section was position #1155-001. Therefore, the only position which could have been title changed to Planning Analyst VI was position #1155-001. For the foregoing reasons, the Commission concludes that Mr. Vanderwall has proved that DCS violated the Civil Service Rules concerning Ms. Sterne's title change. The Commission

> would order that disciplinary action be taken against the person who was responsible for this error (wrongdoing); however, Mr. Vanderwall did not put on any evidence to enable the Commission to determine who that person was....Frank Reitzel, the then Chief of the Classification and Pay Division of DCS... might be said to be ultimately responsible....However, Mr. Reitzel has retired from State Service and therefore is not subject to any disciplinary action.

NOTE: The whistleblower himself became a direct victim of unconstitutional discrimination first, when the above-cited "position #1155-001" and references to it were illegally whited-out from his job description to conceal and so duplicate that existing position and other agency units and functions in order to benefit Ms. Sterne, the favored employee; secondly, when an aggressively obtained

copy of an official State Civil Service document dated December 7, 1983, was found to have falsified those same facts; and thirdly, when unconstitutionally, as explained below, his position was title changed (rather than competitively Reallocated) so as to disregard his qualifications and to deny (since 1978 and to this day in October 1987) the opportunity for him or another qualified person to fill position #1155-001.

After the quasi-judicial Commission in its OPINION, dated October 7, 1985, denied the appeal, upheld the Title Change and condoned the criminal act itself of whiting out a public personnel document saying that it did not falsify but made the job description "more accurate," the whistleblower appealed to

Louisiana's Court of Appeals, First Circuit, which thereupon made a **"manifest error"** in its own OPINION as quoted verbatim below:

> William Vanderwall appeals an opinion of the State Civil Service Commission **upholding the conferring** on Ms. Sterne of the title of Planning Analyst VI....
>
> ....The State Civil Service Commission in its opinion noted that Mr. Vanderwall had simply failed to prove discrimination. After a full review of the record, we find no manifest error in this ruling or in the opinion of the State Civil Service Commission.

Subsequently, the Louisiana State Supreme Court, on September 4, 1987, "Denied" the whistleblower's Application for a Writ of Certiorari and, on September 25, 1987, "Denied" an Application for Rehearing which included the larger issue of the Louisiana State

Civil Service Department-Commission's own operation of a patronage-spoils system.

Of major public importance were two discoveries made after his investigation-prosecution, which caused the whistleblower to file in Federal District Court, on February 4, 1986, a lawsuit based on 42 USC 1983 versus State officials for serious public wrongdoing committed "under color of law" and based on the Fifth and Fourteenth versus the Federal defendant for failure to enforce Congressional intent and law "to strengthen" state and local Merit Personnel Systems so as to enforce the Five Merit Standards of which one is "to protect the rights of employees."

The first discovery came from Item

35, as already quoted verbatim above on page 13, of the Commission's OPINION, dated October 7, 1985, which clearly explained how the State Civil Service Department-Commission in Louisiana, and perhaps elsewhere in this Nation's governments, operates its own patronage-spoils system. Thus, this Machiavellian, clever, and unique discriminatory personnel practice **TREATS THE SAME RATHER THAN DIFFERENTLY** (as all Civil Service Rules state it) both the favored and the unfavored employee with a **TITLE CHANGE of BOTH THEIR POSITIONS SO AS NOT TO REQUIRE, AS PER CIVIL SERVICE RULE 5.7, STATE CIVIL SERVICE STAFF'S CONSIDERATION OF THE QUALIFICATIONS OF EITHER EMPLOYEE.** Thus, the favored but otherwise unqualified employee is enabled to

circumvent Louisiana's Constitutionally required competition/certification/ qualification processes and to be promoted/appointed by being "grandfathered" or "blanketed" or "Title Changed" into a higher classification/ pay/position of decision-making authority for which he/she could not otherwise qualify/compete. The danger herein is that the State Merit System in Louisiana (which was created by Louisiana's Constitution and, since 1978, has even authority over most of the Governor's administrative staff) could operate its own patronage-spoils system--unaccountable to no other authority other than its own "exclusive powers" which it has claimed often throughout this case.

The second discovery, which led to

Federal litigation, came from a clue derived from testimony elicited on February 5, 1985, with regard to "position #1155-001." Obtained sometime thereafter was a copy of another official State Civil Service document (see Appendix F), dated August 1, 1980, as well as April 7, 1981, which showed that both Mr. Frank Reitzel and one or more members of the Commission made very timely attempts to abolish, conceal (at least temporarily as explained later) and so duplicate the Public Health Agency's position #1155-001 to effect the fantastic increase in Ms. Sterne's classification, pay, and authority. In 1979, another position and its incumbent was similarly concealed in order to hire Ms. Sterne. In like manner, in 1978 and to this day in October 1987, position

#1155-001 has been abandoned so as to have provided both Mr. Kimbrell and Ms. Sterne with unofficial, temporary, but potentially everlasting "Acting" authority as Director of the above-cited Policy, Planning and Evaluation Section. Thus, on August 1, 1980, exactly four days after a Governor Treen-appointed State Health Officer traumatically ended Ms. Sterne's almost one-year reign of unofficial authority, Mr. Reitzel initiated the abolishment of position #1155-001 and allegedly began to create a new, fraudulent Planning Analyst job classification series as an opportunity to uncompetitively Title Change Ms. Sterne and her position, In a similar, very timely act "in early 1981," on April 7, 1981, the Commission itself, officially--but temporarily--

abolished position #1155-001 so that it could/would not appear in the State Pay Plan and be considered during both the development and implementation of State Civil Service's "newly created" Planning Analyst Series. Indeed, "abolished temporarily," because on that same day, February 15, 1982, that the fateful Title Changes were made, State Civil Service Mr. Reitzel still incredibly blundered when he Reallocated the officially abolished position #1155-001 downward from GS-35 to GS-29 at the same time he Title Changed Ms. Sterne's position from GS-24 to GS-35. Could it have been that Mr. Reitzel did not know of the Commission's deceptive act? This and many other questions remain unanswered and begged for a day in court.

Today, in October 1987, in defiance of or with the consent of the Commission, State Civil Service has yet to correct Mr. Reitzel's "violation of Civil Service Rules" since Ms. Sterne still has the lofty Planning Analyst VI classification, gets a fantastic $600 boost in monthly salary--retroactive to a period December 1, 1981 to March 15, 1982, during which time the Commission, as noted above, has admitted she did not perform in the capacity for which she was paid--i.e., FRAUD AND GRAND LARCENY? --and retains a high position of authority. Furthermore, the Public Health Agency's official position #1155-001 has yet to be opened to competition amongst qualified persons, as the Louisiana Constitution and the State's Public Health requires. Today,

it is now final that neither the Commission nor the State Courts can be relied upon for correction/relief/ reform; the same is true of Federal Courts as follows:

The Federal District Court, on May 23, 1986, acknowledged "to the conspiracy to violate the plaintiff's rights, the plaintiff's complaint is **timely** because he had no knowledge such a conspiracy existed until February 5, 1985," but went on: to dismiss the defendants, Smith and Kimbrell, to dismiss the charges of conspiracy, etc., and the whole case itself because of PRESCRIPTION based upon Louisiana's RULE OF CONSTRUCTIVE NOTICE OF TORT which it defined as:

> Whatever notice is enough to excite attention and put the owner on his guard and call

> for inquiry and is tantamount to knowledge or notice of everything to which inquiry would lead.

The fact is that the whistleblower did have knowledge of a conspiracy amongst governmental officials and thus called for inquiry, i.e., an investigation by the Commission, on January 10, 1984, not having then nor until sometime after the prosecution on February 5, 1985, "notice of everything to which inquiry would lead," namely the discovery that one or more members of the Commission itself participated in the conspiracy, etc. Everything then fell into place: why the Commission misfiled for 15 months the first appeal; why it was so defensive-offensive during the prosecution; and why it still defies a Mandamus and any correction of acknowledge "violation of Civil Service

Rules." Apparently, it is confident that no power on Earth can coerce them.

The Federal Court of Appeals, Fifth Circuit, upheld the District Court's decision(s). However, when State Civil Service's Chief Attorney, Mr. Robert Boland, moved to dismiss the defendants, Mr. Sumrall and Mr. Reitzel, the whistleblower appealed once more and pointed out: that the Commission itself accused Mr. Reitzel of "violating Civil Service Rules"; that there had been no pretrial hearing/review of other evidence of wrongdoing; and that the U.S. Magistrate who, presumably, would have conducted such a hearing but couldn't since he discovered that the case was at the Appeals Court and who then spent his time, before attorneys from the U.S. Attorney and the State

Attorney General's Offices responding to Civil Service's Attorney Boland's remark to the whistleblower that "YOU CAN ALWAYS USE A GUN" to get justice. IT IS ALSO IMPORTANT TO NOTE THAT MR. BOLAND DID NOT RESPOND EITHER TO THE WHISTLEBLOWER'S BRIEF, DATED OCTOBER 17, 1986, TO THE COURT OF APPEALS, FIFTH CIRCUIT, NOR TO A COMPLAINT LODGED IN STATE COURT IN SEPTEMBER 1986 DIRECTLY AGAINST HIM FOR ALLEGEDLY INVENTING/ CONDONING THE ALLEGED WRONGDOING. In the Brief, the whistleblower naively dropped the Prayer for Judgment for money damages--since the suit against Mr. Boland asked for that--and prayed for only the opportunity to present his evidence of governmental wrongdoing so as to support his REMAINING PRAYERS FOR DECLARATIVE AND INJUNCTIVE JUDGMENTS

TOWARDS THE REFORM OF LOUISIANA'S CIVIL SERVICE SYSTEM. Whereupon, the Court of Appeals, ON ITS OWN MOTION, dismissed the appeal for "LACK OF JURISDICTION" and explained:

> On appeal, Vanderwall expressly abandons his request for relief. By way of relief, he seeks only the opportunity (as per 42 USC 1981) to remain in the Federal District Court so as to 'give evidence' generally about various practices of the defendants. This change in Vanderwall's requested relief implicates the constitutional standing doctrine. Because the issue goes to jurisdiction, we raise it on our own motion.
>
> ...Vanderwall's newly requested relief...might ease his frustration. The Supreme Court has made it clear, however, that 'the psychological consequence presumably produced by observation of conduct with which one disagrees' is not a sufficient personal injury for constitutional standing,

to which the whistleblower responded in his Petition for Panel Rehearing on

July 22, 1987, with the case of United States ex rel Motley v. Rundle (1972, ED Pa) 340F Supp 807, 810-811; a Federal Court ruled:

> Whether or not actual compensatory damage is present, a plaintiff in an action under 42 USC 1983 may also recover nominal damages because the constitutional rights of a citizen are so valuable to him that an injury is presumed to flow from the deprivation itself. In most cases when a public official denies rights that the citizen felt secure under our Constitution, the result is hurt feelings, outrage, embarrassment or humiliation and nominal damages may be awarded for those natural consequences of lawless action by state officials.
>
> COMMENT: Apparently under 42 USC 1983, even "psychological consequence presumably provided by observation of conduct with which one disagrees" is "a sufficient personal injury for constitutional standing."

Nonetheless, the Court of Appeals,

Fifth Circuit, "Denied" on August 10, 1987, the Petition for Panel Rehearing and "Denied," on September 29, 1987, a second motion for stay of the Mandate.

The whistleblower, though not an attorney, concludes this Statement of the Case with the observation that neither the Federal District nor Appeals Courts nor the legion of lawyers that have been his adversaries have properly addressed the special legal benefits provided to persons who blow the whistle on public wrongdoing as per 42 USC 1983.

REASONS FOR GRANTING THE WRIT

I

DUE PROCESS MUST WORK (in reference to Issue No. 1 and Constitutional challenges Nos. 1, 2, and 5):

Constitutional Due Process has been adequately defined by:

- The U.S. Supreme Court as per the U.S. Supreme Court Bulletin, Volume 8, Number 6, page 7, of January 24, 1986, as follows: "The due Process Clause was intended to secure an individual from an abuse of power by governmental officials" (the essence of 42 USC 1983);

- Daniel Webster, operationally, as "law which hears before it condemns; which proceeds upon inquiry; and which renders judgment only after trial."

This whistleblower has twice been denied Constitutional Due Process; first, as a direct victim of public wrongdoing, namely by high-level governmental officials clothed by "color of law"; and secondly, by the legal system including lawyers and the courts, as follows:

In the first instance, denial of

Due Process was more than having been victimized by the public official's criminal lawbreaking, as cited above, but rather by denial of definite and specific constitutional rights, namely, protection against undue discrimination by the uniquely uncompetitive and unconstitutional Title Change personnel mechanism that is contrary to Louisiana's Constitution and a Louisiana Supreme Court decision which together says that "if at all practical," both new and old incumbents of old and new positions shall be subject, that is to say, "proceed with inquiry," to the conditions of merit/certification/competition/qualification, etc. It is fundamentally argued that there is no logical or logistical reason that the Title Change personnel mechanism like

its counterpart Reallocation (wherein there is a change of duties and responsibilities) cannot be subject to the PROCESSES of qualification/ certification/competition. This whistleblower was, because of public wrongdoing and the deliberate failure to "proceed upon inquiry," denied twice, in 1978 and in 1982, the process/ opportunity to qualify/compete for "position #1155-001."

In the second instance, both the State and Federal Courts, as well as the Federal Office of Personnel Management, have denied Constitutional Due Process in terms of its definition by Daniel Webster since none of them has, via the otherwise workable 42 USC 1981 and 1983, listened to, inquired into, or judged the merits of the whistleblower's body

of documentary and testimonial evidence of public-governmental wrongdoing. (Please see Petitioner's Petition for Panel Rehearing to the Federal Court of Appeals, Fifth Circuit, Appendix E, wherein the whistleblower successfully argued the special legal benefits of 42 USC 1983.)

II.

EQUAL PROTECTION MUST WORK in reference to Issue No. 2 and Constitutional challenge No. 6.

The 42 USC 1983s provision of an attorney in criminal but not Civil Service cases, even if constitutional rights are involved, seems, in itself, contrary to equal protection of the law when the hardly well-off public servant must either, with humiliation, apply as a pauper or go the way this

whistleblower went--which was hardly inexpensive or productive. This whistleblower has from the beginning stated his belief that, if armed with truth and specific, concrete facts/evidence, obtaining justice in a Civil Service case should not depend upon having a lawyer, because in most of those cases, the cost of an attorney far exceeds the reward of whatever, such as "pay, employment, or promotion," that may be granted--unless the reward is a matter of principle.

Louisiana's law R.S. 13:5108.I was invoked in this case to defend/protect the wrongdoers who are allegedly guilty of criminal behavior against the government, the public, Public Health, and this whistleblower. Indeed, the Louisiana Attorney's Office has defended

not only Mr. Kimbrell--whose lawyer (as provided by the Public Health Agency) obeyed R.S. 13:5108 by forwarding the complaint to the Attorney General within five days, but also Commission Chairman Smith, State Civil Service Director Sumrall, and Reitzel--who were initially defended by State Civil Service's Chief Attorney, Mr. Robert Boland, who did not obey R.S. 13:5108.I. However, after Mr. Boland failed to respond to the whistle-blower's Brief to the Federal Court of Appeals, Fifth Circuit, and to a complaint lodged against him in a Louisiana District Court (for inventing/condoning the wrongdoing), the Louisiana Attorney General's Office has defended Mr. Boland, even though he once again failed to obey R.S. 13:5108. Even so, for the Louisiana Attorney General's

Office to defend an accused public employee/official, the question arises as to what point in time does he "proceed to inquire"/investigate to determine whether or not his client was a wrongdoer--or is that decided after the whistleblower wins or loses his case?

The Civil Servant-whistleblower requires legal assistance just to avoid such obstructions of justice as twisting the facts/truth, by delaying, by unnecessarily duplicating several times, the documentary evidence to bloat the record, by dragging out the whistle-blower's prosecution to a day and one-half so as to bloat the transcription, by issuing a 21-page, single-spaced opinion dated October 7, 1985, that will be extremely difficult to reduce to a four-by-seven-inch format, so on, and so on.

III

CIVIL SERVICE MUST BE CONTROLLED IN ORDER TO WORK (in reference to Constitutional No. 3).

The State Civil Service Merit System in Louisiana, if not elsewhere in this Nation, has become AN UNCONTROLLED GOVERNMENT WITHIN A GOVERNMENT empowered by the State's Constitution with, as it claims often in this case, "exclusive powers" that are without the separation and thus the checks and balances amongst rule-making, administering, judging (indeed, like a Kafka court which it needed, as later found out, to protect itself) and investigating to the extent that they can confidently operate, in the manner of tyranny, i.e., above its own rules and those of others as demonstrated by its defiance, in

contempt of court, of a Mandamus, of any correction of its own acknowledged "violation of Civil Service Rules," and, in short, of every aspect of the State's Oath of Office as cited above. It is this self-contained arbitrary, unaccountable, and uncontrolled governmental power that believes it can get away with undue discrimination, denial of rights, and, indeed, as cited above, criminal behavior that makes this case one of extreme public importance--because Civil Service is supposed to qualify and protect those employees who actually operate our government(s).

This whistleblower, who has been uncomfortably between those who wish to legislate Civil Service out of existence and those who worship it as above error, wrongdoing, and as a sacred cow which

can do as it pleases, argues that our Merit Systems, as the backbone, in terms of personnel and standards, of modern government must work and work well. To work, it must, like any governmental authority, be subject to "judicial review," somehow to separation of powers, and to reasonable regulation. In short, Civil Service must be controlled and because it is government within government and subject to our Constitution, it is within the proper concern and jurisdiction of the U.S. Supreme Court, the guardian of our Constitution, and, in this case, the last legal resort to make effective already existing workable controls such as the Constitution, 42 USC 1981, 1983, and 1985, as well as 42 USC 4701 and 4721, the Office of Personnel

Management, Civil Service, standards, and whistleblowing as discussed below.

While the U.S. Congressional "Inter-governmental Act of 19 " sought Federal deregulation of State Merit Personnel Systems, it is argued that surely it did not intend to go President Reagan's Executive Order and the Federal Office of Personnel Management's route of complete "self-certification" which is tantamount to no regulation at all or to negate 42 USC 4701 and 4721 with which "to strengthen" the State's Civil Service System's adherence to Five Merit Standards, the fifth one being "to protect the employee's rights." What says it all about this dangerous failure to regulate/control/protect is this whistleblower's nightmarish experience plus the fact that the Federal Office of

Personnel Management (the former Federal Civil Service Commission) has abolished and reduced the functions of its former Bureau of State Merit Systems to one person, Mr. Ashton Morris, who receives but obviously cannot act upon complaints.

STANDARDS MUST WORK. On a higher level of concern, this lawsuit challenges the entire practice of "grandfathering in," "blanketing in," "title changing in," and "Acting" appointments without consideration of at least minimum merit(s) as means to circumvent the processes of qualification/certification/competition, in short, standards of performance in a particular field, thus putting undue risk upon consumers, whether governments or persons. Especially in this era of

high technology, the consumer should be assured that at least governmental providers/workers meet, have acquired, or retain certain standards of capability and know whether a certain title/position was earned, retained, or merely bestowed. To minimize risk to all concerned, it behooves the professional or otherwise skilled/ certified provider, through continuing education, retraining, and the like, to meet continuously one minimum standard for all in a particular field of practice; otherwise, it is a question of equity as well as "let the buyer beware" in areas where standards should reduce that danger.

CIVIL SERVANT-WHISTLEBLOWER'S RIGHTS

The basis of the whistleblower's appeal to the Commission was Civil

Service Rule 13.10(c) which reads:

> Any person in the classified service who alleges that he has been deprived on any rights, discriminated against, or adversely affected by the violation of any provision of the Article or of Rule of this Commission.

Amongst his other rights does, in particular, the Civil Servant have the right, beyond free speech: first, to be a whistleblower since he can observe and possibly prevent firsthand governmental wrongdoing; secondly, whether for good or ill, to be, if not believed, at least heard, with Due Process so as to "proceed with inquiry"; and thirdly, to be protected by the Constitution, 42 USC 1981, 1983, 1985 (if conspiracy is involved), Civil Service, the Federal Office of Personnel Management, the District and State Attorney General, and the Court?

Accordingly, does the Civil Servant have the right (perhaps at the same time he takes the Oath of Office) to be "read his Constitutional Rights," which must be done, no less, with criminals? Is it not incumbent upon Civil Service and the Federal Office of Personnel Management to spell out these rights, to have them read, and subsequently to protect the Civil Servant's exercise (even as an accuser of wrongdoing) of those rights, if necessary in court; indeed, perhaps provide legal assistance to counter, say Louisiana's R.S. 13:5801.1 (if it is determined to be constitutional in terms of equal protection) which requires protection of the accused Civil Servant unless shown to be a wrongdoer?

With regard to the U.S. Supreme Court's ruling in the case of Bishop

v. Wood, 96 S.Ct. 274, 280 (1976), does it not have to go beyond the "harsh" "errors" and "mistakes" to the harsher abuses of public trust and power so as not to conflict with orotected rights under 42 USC 1981, namely, "to present evidence" of governmental wrongdoing as per 42 USC 1983? If the Civil Servant has the right (indeed, the moral responsibility) to be a whistleblower and to expect Due Process and protection, then he could directly, as per Bishop v. Wood, "claim that the public employer was motivated by desire to curtail or to penalize the exercise of an employee's Constitutionally protected rights" if the public employer ever attempted to stop whistleblowing. In anticipation of the argument that such whistleblowing rights would turn

our Civil Service System into a body of stool pigeons, it needs to be reiterated that any governmental behavior should also be questionable, questioned, and answerable.

IV

WHITING OUT PUBLIC JOB DESCRIPTIONS BY PUBLIC OFFICIALS SHOULD NOT WORK (in reference to Issues Nos. 1 and 2 and Constitutional Challenge No. 4).

What makes the whiting out of the whistleblower's job description (an official public personnel document) contrary to Due Process is that the act was done by public officials under "color of law" with fraudulent conspiratorial intent, all of which comes under the purview of 42 USC 1983 and 1985. Otherwise, the act itself could/would simply be considered a

violation of Louisiana Criminal Code 131 prohibiting "injury to public records." If the U.S. Supreme Court chooses silence or affirms that this act, amongst others, is "permissible," then every governmental job description becomes prey to managerial manipulation under the arbitrary guise of making the document "more accurate." Tyranny, which is without rules or the violation of rules including their own, would abound with totalitarian reasoning that "the end justifies the means," as long as it is their ends. Suffice it to say that in its official report dated December 7, 1983, State Civil Service itself questioned Mr. Kimbrell as to why, instead of whiting out, didn't he utilize Item 15 on the back of the job description which is to be used by

supervisors to make their modifications. Despite this fact, the whistleblower's job description is yet to be corrected and fully restored as a matter of Due Process, honesty, and fairness. The official report of December 7, 1983, the whiting outs and the Title Changing of the whistleblower's job description were altogether fraudulent, criminal activities, and unconstitutional.

CONCLUSION

For these reasons, this Petition for Certiorari should be granted because they reflect the real, as in Louisiana, a potential state of tyranny that could affect the quality and the protection of all those classified civil servants who actually operate the government(s) in this Nation--thus making this case particularly within the proper concern

and jurisdiction of the U.S. Supreme Court. However, one reason, namely the constitutionality of Louisiana's unique discriminatory practice of treating both the favored and the unfavored the SAME rather than DIFFERENTLY, should be decided on the face of it. All other reasons should cause the case(s) (especially because of the tremendous volume of documentary evidence that is contained in each Court record) to be remanded back to the Federal District Court and/or to the Louisiana State Civil Service Commission for the purpose of requiring it/them to make adequate findings of fact and conclusions of law, this time based upon the letter and spirit of 42 USC 1983 and 1981 towards declarative/injunctive judgments to resolve the lesser substantive

Constitutional challenges and thereby the issues. The Court's denial or silence itself would decisively condone/ encourage continuation of serious governmental wrongdoing that now has the immunity of a sacred cow but which will likely re-emerge in a class action lawsuit conducted by skilled lawyers. Eventually. Why not now?

Respectfully submitted,

William R. Vanderwall

WILLIAM R. VANDERWALL

In Proper Person

6645 West End Blvd.
New Orleans, LA 70124
(504) 486-4672

Of Counsel:
Robert Boland, 5700 Florida Blvd., Baton Rouge, LA 70809 (504) 925-1978

Arthur Finn, 234 Loyola Ave., New Orleans, LA 70112 (504) 568-5575

Mark Gallinghouse, 500 Camp St., New Orleans, LA (504) 539-2921

November 6, 1987

EDITOR'S NOTE

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87-952

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term. I987

WILLIAM R. VANDERWALL, Petitioner

v.

CONSTANCE HORNER, et al, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

****

APPENDICES

****

Of Counsel:

MR. ROBERT BOLAND
Attorney
Louisiana State
Civil Service
5700 Florida Blvd.
Baton Rouge, La.
70809
(504) 925-I978

WILLIAM R. VANDERWALL
6645 West End Blvd.
New Orleans, La.
70124
(504) 486-4672
IN PROPER PERSON.
Petitioner

MR. ARTHUR FINN, ATTORNEY
Louisiana Attorney General's Office
234 Loyola Ave., New Orleans, Louisiana
70112
(504) 568-5575

MR. MARK GALLINGHOUSE, U. S. ATTORNEY
500 Camp St.
New Orleans, Louisiana
(504) 589-2921

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MR. ROBERT BOLAND
Attorney
Louisiana State
Civil Service
5700 Florida Blvd.
Baton Rouge, La.
70809
(504) 925-1978

WILLIAM R. VANDERWALL
6645 West End Blvd.
New Orleans, La.
70124
(504) 486-4672

IN PROPER PERSON.
Petitioner

MR. ARTHUR FINN, ATTORNEY
Louisiana Attorney General's Office
234 Loyola Ave., New Orleans, Louisiana
70112
(504) 568-5575

MR. MARK GALLINGHOUSE, U. S. ATTORNEY
500 Camp St.
New Orleans, Louisiana
(504) 589-2921

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APPENDIX

(OPINIONS AND JUDGMENTS)

A LOUISIANA STATE CIVIL SERVICE COMMISSION (APPEAL NO. 4278) OPINION, DATED 10-7-85

B

C

D UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA (NO. 86-525, SECTION "E")
- ORDER AND REASONS, 5-23-86
- ORDER AND REASONS, 8-14-86
- ORDER AND REASONS, 8-18-86

E UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT (86-3617)
- DISMISSAL, 7-9-87
- **PLAINTIFF-APPELLANT'S PETITION FOR PANEL REHEARING, 7-22-87**
- DENIAL OF PETITION FOR PANEL REHEARING, 8-10-87

F STATE CIVIL SERVICE DOCUMENT DATED 8-1-80 AND 4-7-81

APPENDIX A

: :

. . . . . OPINION . . . . . .

: :

. . . . DATED: October 7, 1985 . . . .
. . . . FILED: October 7, 1985 . . . .

: :

IN RE:
Appeal of William R. Vanderwall
(Department of State Civil Service)

STATE OF LOUISIANA
CIVIL SERVICE COMMISSION
DOCKET NO. 4278

STATEMENT OF THE APPEAL/REQUEST FOR INVESTIGATION

Appellant/complainant was employed by the Department of Health and Human Resources as a Planning Analyst IV in the Office of Health Services and Environmental Quality and was serving with permanent status. Mr. Vanderwall retired from State service effective August 31, 1984.

On January 10, 1984, Mr. Vanderwall, in proper person, filed a

request for appeal, wherein he complains of a decision dated December 13, 1983, of the Director of the Department of State Civil Service, which affirmed Mr. Vanderwall's allocation to the class of Planning Analyst IV. In the request for appeal, Mr. Vanderwall also asks for an investigation. Mr. Vanderwall alleges that there are widespread discriminatory and unfair practices in the Department of Health and Human Resources and in the Department of State Civil Service, hereinafter referred to as DHHR and DCS, respectively. Mr. Vanderwall alleges that DCS's attitude is negligent because it considers bad management at DHHR beyond its concern. Mr. Vanderwall charges that DCS's decision was discriminatory because it was not made independently of the decisions of his

superiors at DHHR. Mr. Vanderwall alleges that his position does not fit into the Planning Analyst series bcause his job cannot evolve from or function within the Planning Analyst series; that it requires "a long term, high level and highly varied background with which to comprehensively grasp and innovatively cope with major public health and related problems;" because it requires and is burdened by permanent supervisory responsibilities; because it requires utilization of Public Health Physicians; because it is more congruent with Research and Development practiced by the Federal government and the private sector; and because it entails the creation of health care plans rather than the analysis of the plans developed by others. Mr. Vanderwall alleges that

plaintiff's complaint with motions to dismiss under Fed. R. Civ. P. 12(b)(1) and (6), claiming that the federal court lacks subject matter jurisdiction of this action, and that, in any event, the complaint fails to state a cause of action. After a careful review of the record in this case, I find that the defendants' motions must be GRANTED.

FACTS

The plaintiff is a former employee of the Louisiana Department of Health and Human Resources (DHHR). During his tenure at DHHR, he served as Chief of the Section for Medical/Public Health Social Work for the State of Louisiana, and served as Louisiana's Public Health Program Developer. The defendants include Ms. Constance Horner (the Director of the United States Office

of Personnel Management), Mr. James Smith (the Chairman of Louisiana's Civil Service Commission), Mr. Joseph Kimbrell (the Deputy Assistant Secretary of DHHR), and Mr. Herb Sumrall (the Director of the Louisiana Department of Civil Service), among others. Of particular concern are Mr. Smith and Mr. Kimbrell, whose motions are at bench.

Plaintiff represents himself, and in a slightly murky complaint, he alleges that the defendants conspired to violate the Louisiana State Merit Personnel System and its federal counterpart by passing him over for certain promotions and by demoting him. He alleges, pursuant to 42 U.S.C. §1983, that the defendants' behavior denied him his due process interest in his

employment. He suggests that the conspiracy to evade the Merit Personnel System began in 1980, and extended to early 1982, though he did not discover it until hearings before the State Civil Service Commission on February 5, 1985. This discovery led him to file the present action on February 4, 1986, even though two lawsuits based on the same set of facts are presently pending before the State Courts on appeal from the State Civil Service Commission.

In response to the plaintiff's complaint, two of the defendants, Mr. Kimbrell and Mr. Smith, move the court to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6) for lack of subject matter jurisdiction and for failure to state a claim. The defendants base their motions on a

variety of legal theories. They maintain that the plaintiff's suit is barred by the Eleventh Amendment's restriction of the Federal Courts' jurisdiction, that the State Civil Service Commission and State Courts have the sole subject matter jurisdiction of the plaintiff's cause of action, that the suit is barred under principles of res judicata, that the plaintiff has failed to state a claim upon which relief can be granted, that the plaintiff's claim is prescribed, and that the present action must be stayed pending the outcome of the litigation in the State Courts. I will address each of these arguments in turn, construing the complaint in favor of the plaintiff and taking its allegations to be true. 5 C. Wright & A. Miller, Federal

Practice and Procedure, §1357.

DISCUSSION

1. The Eleventh Amendment

The defendants, who are both employees of the state, argue that the plaintiff's suit must be barred according to the Eleventh Amendment principles stated in Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347 (1974). Edelman forbids relief that is equivalent to an award of money damages for past injuries to be paid directly from the state fisc. American Civil Liberties U. of Miss. v. Finch, 638 F.2d 1336, 1341 (5 Cir. 1981). This principle applies to state officials and agencies when a suit against them will be paid from the state fisc, rather than by them personally. Finch, supra, at 1340-1341; Karpovs v. State of Miss.,

664 F.2d 640, 644 (5 Cir. 1981). However, it has long been the law that the Eleventh Amendment will not bar a suit against an individual state official for his personal wrongdoing (or constitutional violations) while in office, unless that suit is "in essence one for the recovery of money from the state," with the state paying the bill for the defendant's wrongdoing. Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, at 350 (1945); Finch, id.; Karpovs, id. In essence then, the plaintiff's suit will be barred by the Eleventh Amendment if any damages he could recover will be paid out of the State treasury.

In this case the State of Louisiana will not be responsible for payment of any damages to which the plaintiff might

be entitled. The plaintiff accuses the various defendants of conspiring to commit a series of intentional constitutional torts on him. Such torts are explicitly excluded from the State of Louisiana's statutory indemnification of its employees by Louisiana Revised Statute 13:5108.1. Thus, the state fisc is in no way jeopardized by the present litigation, and the plaintiff's cause of action is not barred by the Eleventh Amendment. See Karpovs, id.; and see Finch, id.

2. Subject Matter Jurisdiction

Defendant Kimbrell argues that the matters addressed in the plaintiff's complaint are solely within the subject matter jurisdiction of the Louisiana Civil Service Commission, and notes that cases like Bishop v. Wood, 426 U.S. 341,

96 S.Ct. 2074 (1976), and Carbonell v. La. Dept. of Health & Human Resources, 772 F.2d 185 (5 Cir. 1985), imply that the federal courts are not the proper fora to review personnel decisions made by state agencies, or claims previously made in state fora. Bishop, supra, at 349, 2080; Carbonell, at 188. He argues that the plaintiff's complaint must therefore be dismissed.

I am quite willing to agree with the defendant that the federal courts have no business reviewing the personnel decisions of state agencies, so long as no new allegations of constitutional violations are present in the prospective plaintiff's complaint. But surely the defendant does not mean to suggest that when, as here, the plaintiff alleges for the first time

that his due process rights have been violated, the federal courts should refuse to take jurisdiction of the case. Indeed, federal courts take jurisdiction of such cases every day. See, e.g., Cleveland Bd. of Educ. v. Loudermill, ___U.S.___, 105 S.Ct. 1487 (1985), and cases cited therein. So what the defendant must mean by this motion is either that the plaintiff has failed to state a cause of action upon which relief can be granted (the situation in Bishop and Loudermill), or that the federal court should stay any action while related actions are prosecuted by the plaintiff in the state court. I will consider each of these possibilities below, but I note here that I do have subject matter jurisdiction of this case because the

complaint presents a federal question on its face, and this question was not previously decided in the plaintiff's state causes of action.

3. Res Judicata

Defendant Kimbrell also argues that the plaintiff's suit must be dismissed because the Louisiana State Civil Service Commission has heard the plaintiff's complaints twice previously, and the results of those hearings (now pending judicial confirmation in the state courts) are res judicata here. The defendant argues, in effect, that the plaintiff's attempt to make his federal claims in this lawsuit is an impermissible attempt to split his claim, and that any claim now made is barred by the prior judgment of the State Civil Service Commission.

This issue is governed by 28 U.S.C. §1738, which provides in relevant part:

> (t)he . . . judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . .

This section has been held to require federal courts to give the same preclusive effect to state court judgments (and quasi-judicial administrative decisions) that those judgments emerged. Kremer v. Chemical Const. Corp., 456 U.S. 461, 102 S.Ct. 1883, 1889, 72 L.Ed.2d 262 (1982). However, for this section to have effect with regard to administrative decisions, that are not quasi-judicial, there must be a state court judgment reviewing the

administrative decision in order to fully satisfy due process. Kremer, supra, at 1397-8; King v. City of Pagedale, 573 F.Suppl 309, at 313 (E.D. Missouri) ("<a> state administrative proceeding is not sufficient to support preclusion standing alone, but preclusion does arise if the administrative decision is affirmed on judicial review").

In the case at bench, there has been no state judicial review of the State Civil Service Commission's decision regarding the plaintiff, and I cannot tell from the materials before me whether that decision was quasi-judicial or not. But state judicial review is now pending. So, to be safe, I hold that when the state courts of Louisiana pass on the Civil Service Commission's

determination, their judgment will be given full faith and credit under 28 U.S.C. §1738, and will have preclusive effect here, if that judgment satisfies the Louisiana requirements for res judicata. But to treat the judgment of the Civil Service Commission as res judicata now would be premature.

4. Prescription

Defendant Smith maintains that the plaintiff's action is prescribed. He correctly points out that the time for filing a federal civil rights claim is governed by the local statute of limitations for personal injury actions. Wilson v. Garcia, ___U.S.___, 105 S.Ct. 1938, 1949 (1985). In Louisiana, the local statute provides for a limitations period of one year. LSA--C.C. art. 3492. Defendant Smith alleges that the

plaintiff retired from DHHR in 1984 (the last possible date on which the defendant could have infringed on the plaintiff's rights), and that the present complaint was not filed until 1986, two years later. This period exceeds that allowed by Louisiana Civil Code Article 3492, and the defendant urges that the plaintiff's action be dismissed.

Plaintiff replies to this argument by alleging that he only became aware that the defendants were conspiring to deprive him of his rights after a hearing before the Civil Service Commission on February 5, 1985. I note that I must take this allegation to be true for the purposes of deciding the defendants' motions. 5 C. Wright & A. Miller, Federal Practice and Procedure,

§1357. And, taking this allegation to be true, plaintiff's complaint would be timely filed on February 4, 1986 (the date it was in fact filed), that date being just under one year after he became aware that a conspiracy to violate his rights existed. See Orgeron v. Mine Safety Appliances Co., 6FSupp. 364, 367 (E.D. La. 1985) (the prescriptive period begins to run when the plaintiff has either actual or constructive knowledge of the tort committed against him). So, as to the conspiracy to violate the plaintiff's rights, the "plaintiff's complaint is timely because he had no knowledge such a conspiracy existed until February 5, 1985.[1]

The same is not true of the substantive allegations in the

in the plaintiff's complaint, however. As to the substantive claim that his constitutional rights have been violated, the plaintiff had ample constructive knowledge or notice of such violation, if any, when he knew that the defendants were not complying with the state guidelines at the time they made the promotions complained of. This is so because constructive notice of tort is deemed to be "whatever notice is enough to excite attention and put the

---

[1] Of course, plaintiff's suit for conspiracy can only be maintained if a substantive violation of his federal constitutional rights occurred or could occur (i.e. a person can't conspire to commit a violation unless the violation can occur--one can't be liable for agreeing to do what is permissible). Because I rule below (§5) that no violation of the plaintiff's rights has occurred or could occur on the facts stated in his complaint, I also dismiss the plaintiff's allegation of conspiracy.

owner on his guard and call for inquiry" and "is tantamount to knowledge or notice of everything to which inquiry may lead" in Louisiana. Orgeron, supra at 367, quoting Cartwright v. Chrysler Corporation, 232 So.2d 285, at 287, 255 La. 597 (1970). Surely the defendants' failure to comply with the state guidelines when making promotions should have been enough to put the plaintiff on notice that whatever federal right he had in his job was being threatened as well, and the plaintiff should have immediately made an inquiry to find out whether or not those rights had been violated. But he failed to do so, even though he filed two different complaints with the State Civil Service commission, until more than two years after those rights were violated. For this reason,

the plaintiff's complaint that his substantive federal constitutional rights were violated must be dismissed.

5. Failure to State a Claim

The plaintiff complains that the defendants conspired to deny him due process of law by demoting him and by passing him over when making promotions. He also suggests that he has been denied equal protection of the law because the State of Louisiana has supplied attorneys to the defendants but not to him. (Plaintiff's supplemental memorandum in reply to motions to dismiss, p.6). Under the facts stated by the plaintiff, neither of these theories is viable.

The State is constitutionally required to appoint an attorney for a litigant only when he faces criminal

charges. See Mason v. State of Arizona 504 F.2d 1345, at 1351 (9 Cir. 1974), cert. denied 420 U.S. 936. This is so because the right derives from the Sixt Amendment right to counsel rather than from the constitutional guarantee of equal protection under the laws. Id. Any other appointment of counsel at state expense is within the discretion of the state, and it is perfectly prope that a state should appoint counsel for its political subdivisions (as Louisian has done by LSA--R.S. 13:5108.0) provided the appointment has a rational basis or connection with a valid state interest. Id., at 1354. In the case a bench, the state's decision to appoint its own "in-house" counsel (i.e. the attorney general) is perfectly rational and serves the state's fiscal

interest--it saves the state the expense of hiring outside legal help. The state's decision not to supply the plaintiff with a lawyer is equally rational--it too saves the state money. Moreover, this decision has not, apparently, prejudiced the plaintiff's vindication of his rights, as evidenced by this, his third lawsuit. Plaintiff's claim that his right to equal protection has been violated by the state's refusal to appoint him a lawyer is therefore dismissed.

Plaintiff's claim that his federal constitutional rights in his employment were violated depends on his having a property right on his job. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 2708-9 (1972). If he did have such a right, the state could not

deprive him of it (by demoting him) without due process.[2] Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 735-736 (1975). And the plaintiff's right in his employment, if any, must have been created by state law, as such rights do not derive from the Constitution itself Cleveland Bd. of Educ. v. Loudermill, ___U.S.___, 105 S. Ct. 1487, 1491

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[2] I note that failing to promote the plaintiff would not amount to a due process violation in this case because the state would not have taken anything from the plaintiff without due process, it would only have failed to give him something. In other words, the plaintiff could have no property interest in the job to which he wished to be promoted (that interest was a mer expectancy), and so, could not be deprived of any due process right as to it. See Wells v. Doland, 711 F.2d 670, at 675 (5 Cir. 1983). I also note that the plaintiff was not deprived of any liberty interest here--nothing in the state's failure to promote him amounted to a constitutionally impermissible stigmatization. Wells, supra, at 676.

1985.

The Louisiana Constitution creates a property interest in public employment at Article 10. Article 10 provides that state employees shall be removed from their jobs only for cause, and provides for quasi-judicial procedures to ensure that employees of the state are not removed from their jobs unfairly, and to ensure that none of them are unfairly treated with regard to promotion and demotion. LSA-Const. Art. 10, §§5, 8, 10. Clearly, this is enough to create a property right in employment with the state, as it creates a definable and defensible interest in continued employment. Loudermill, supra, at 1493-1494. And, having found a right, the question for the court becomes whether or not the state provided the

plaintiff with a constitutionally adequate opportunity to challenge its actions before depriving the plaintiff of his property interest. Loudermill, supra, at 1493.

Apparently, the state did provide the plaintiff with such an opportunity. From 1978 to the present, the plaintiff has been challenging the employment procedures of DHHR before the Civil Service Commission, and presently has two appeals from the Commission pending in the state courts. See Plaintiff's Complaint, at p. 19. I find that as a matter of law, these procedures are adequate to protect any interest the plaintiff had in preventing the state from demoting him or failing to promote him. So, when the plaintiff was deprived of a property interest in his

employment, no constitutional violation occurred, because the plaintiff was given constitutionally adequate means to challenge that deprivation. Loudermill, supra, at 1493-1494. That is, although the plaintiff may have been deprived of a right or interest, due process has been satisfied, which is all that the Constitution requires. Accordingly, even if the plaintiff's allegation of constitutional deprivation were timely (see §4 above), the facts he alleges fail to state a cause of action. Levitt v. University of Texas at El Paso, 759 F.2d 1224, 1232 (5 Cir. 1985).

In closing, I note that even if the plaintiff had stated a cause of action in this case, the proper procedure would be to abstain from exercising jurisdiction, and wait for the

resolution of the state proceedings. The two state actions now being pursued by the plaintiff may well decide questions regarding the state regulatory scheme for state employment (in addition to a number of factual and other legal issues) which would be relevant here. To intervene now would be to invite unnecessary conflict with the state tribunal, and this I would decline to do even if the plaintiff had stated a cause of action. Stephens v. Bowie County, Tex., 724 F.2d 434, 435 (5 Cir. 1984); C. Wright & A. Miller, Federal Practice and Procedure, §4247.

CONCLUSION

The defendants' motion must be granted.

New Orleans, Louisiana, this 23 day of May, 1986.

_____

UNITED STATES DISTRICT JUDGE

MINUTE ENTRY
AUGUST 13, 1986
LIVAUDAIS, J.

WILLIAM R. VANDERWALL	CIVIL ACTION
VERSUS	NO. 86-0525
CONSTANCE HORNER, ET AL	SECTION "E"(6)

* * * *

On August 13, 1986, the defendants, Herbert L. Sumrall and Frank Reitzel, moved to dismiss the plaintiff's complaint against them in the above-entitled matter. Now, after a review of the material submitted by the parties, and the oral argument of the plaintiff, I find that the defendants' motions must be GRANTED.

REASONS

The defendants Herbert Sumrall and Frank Reitzel both stand in the same relationship to the plaintiff as those defendants previously dismissed by my order of May 23, 1986. Accordingly, their motion to dismiss is GRANTED for the reasons given in that order.

UNITED STATES DISTRICT JUDGE

DATE OF ENTRY August 14, 1986

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

WILLIAM R. VANDERWALL	CIVIL ACTION
VERSUS	NO. 86-525
MS. CONSTANCE HORNER, ET AL	SECTION E/6

J U D G M E N T

Considering this court's order of August 13, 1986, dismissing plaintiff's suit as to defendants Frank Reitzel and Herbert L. Sumrall and considering this court's order of May 23, 1986, cismissing the remaining named defendants;

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of defendants, Ms. Constance Horner, in her official capacity as Director, United States Office of Personnel

Management, James R. Smith, in his official capacity as Chairman, Louisiana State Civil Service Commission, Joseph Kimbrell, in his official capacity as the Deputy Assistant Secretary (and delegated appointing authority), Louisiana Department of Health and Human Resources, Office of Health Services and Environmental Quality (now Office of Preventive and Public Health Services), Frank Reitzel and Herbert L. Sumrall, and against plaintiff, William R. Vanderwall, dismissing said plaintiff's suit at his cost.

New Orleans, Louisiana, this 15 day of August, 1986.

UNITED STATES DISTRICT JUDGE

DATE OF ENTRY Aug. 18, 1986

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-3617

WILLIAM R. VANDERWALL,
Plaintiff-Appellant,

versus

CONSTANCE HORNER, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana
(CA-86-525-E)

(July 9, 1987)

Before REAVLEY, JOHNSON, and DAVIS,

Circuit Judges.

PER CURIAM:*

Plaintiff William R. Vanderwall appeals from the district court's judgment dismissing his action. We dismiss the appeal for lack of jurisdiction.

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

A.

In his complaint against state and federal defendants, plaintiff William R. Vanderwall alleges that he was once an employee of Louisiana state. According to the complaint, various alleged wrongdoing by defendants caused Vanderwall to be passed over for a promotion and caused him to be demoted. The complaint prays for extensive declaratory, injunctive, and damages relief to redress his injury. The district court rendered a judgment dismissing Vanderwall's action. Vanderwall appeals.

B.

On appeal, Vanderwall expressly abandons his request for relief. By way of relief, he now seeks "only the opportunity to remain in the Federal

District Court so as to 'give evidence'" generally about various practices of the defendants. This change in Vanderwall's requested relief implicates the constitutional standing doctrine.[1] Because the issue goes to jurisdiction,[2], we raise it on our own

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[1]The standing inquiry examines the plaintiff's standing at the commencement of litigation. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397, 100 S.Ct. 1202, 1209 (1980); Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205 (1975). This Court is the first court in this litigation to be presented with Vanderwall's newly requested relief. In that sense, the litigation is newly commenced.

The case might also be analyzed in terms of the mootness doctrine. The mootness inquiry examines whether the plaintiff's standing at the commencement of litigation has persisted throughout the litigation. Geraghty, 445 U.S. at 397, 100 S.Ct. at 1209. The label, standing or mootness, is unimportant in this case because the two doctrines are equals in their constitutional dimension, and the constitutional minimum is the issue in this appeal. See id. 445 U.S. at 395-97, 100 S.Ct. at 1208-09.

motion.[3]

In order to have constitutional standing, a "plaintiff must allege (1) personal injury (2) fairly traceable to the defendant's allegedly unlawful conduct and (3) likely to be redressed by the requested relief."[4] We may assume for purposes of analysis that Vanderwall's allegations establish the first two elements of the constitutional standing doctrine. The third element is now absent, however. Vanderwall's newly requested relief--an opportunity to present evidence generally--will not

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[2]Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 37, 96 S.Ct. 1917, 1924 (1975).

[3]Orr v. Orr, 440 U.S. 268, 271, 99 S.Ct. 1102, 1107 (1979).

[4]Allen v. Wright, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324 (1984).

redress his alleged personal injury of demotion and loss of promotion.

We appreciate that Vanderwall is frustrated by and disagrees with various practices of the defendants. His newly requested relief--an opportunity to give evidence generally--might ease his frustration. The Supreme Court has made it clear, however, that "the psychological consequence presumably produced by observation of conduct with which one disagrees" is not a sufficient personal injury for constitutional standing purposes.[5] In other words, under this analysis, the first element of the constitutional standing doctrine

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[5] Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 485, 102 S.Ct. 752, 765 (1982).

is missing.

C.

Without jurisdiction, we cannot proceed. The appeal is therefore

DISMISSED.

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NO. 86-3617

* * * * * * * * * *

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

* * * * * * * * * * * * * * * * *

WILLIAM R. VANDERWALL,
Plaintiff-Appellant

VERSUS

CONSTANCE HORNER, ET AL
Defendant-Appellee

* * * * * * * * * * * * * * * * * *

On Appeal from the United States

District Court for the Eastern District

of Louisiana, New Orleans Division

* * * * * * * * * * * * * * * * * *

PETITION FOR PANEL HEARING

* * * * * * * * * * * * * * * * * *

OF COUNSEL:

MR. ROBERT BOLAND
Louisiana State Civil Service
5700 Florida Boulevard
Baton Rouge, Louisiana 70809
(504) 925-1978

MR. ARTHUR FINN
Louisiana Attorney General's Office
234 Loyola Avenue
New Orleans, Louisiana 70112
(504) 568-5575

MR. MARK GALLINGHOUSE
United States Attorney
500 Camp Street
New Orleans, Louisiana 70112
(504) 539-2921

WILLIAM R. VANDERWALL
6645 West End Boulevard
New Orleans, Louisiana 70124
(504) 486-4672
IN PROPER PERSON--APPELLANT

INTRODUCTION TO THE PETITION FOR PANEL REHEARING

This Petition for Panel Rehearing of its decision of July 9, 1987, presents facts as to "personal stakes" and clarifications of law 42 USC 1983 so as to establish the plaintiff/ appellant's constitutional standing and the Art. III Federal Court's constitutional jurisdiction as well as to bring (for the first time in federal litigation as explained later) to the panel's attention of "a precedent-setting error of exceptional public importance) worthy of, but presumably not necessary, a Suggestion for Rehearing En Banc. (An apology aforehand is given for the length of this response and the following heavy

use of underlines.)

Before anything, this non-lawyer plaintiff/appellant appreciates this court's calling to his attention of his naive but well-intended statement to no longer seek monetary damages of presumably one dollar to four million dollars. The statement, which was made to highlight his priorities, was also rooted in his perception of a realistic legal Catch-22 bind, as will be seen.

Also quickly in passing, it is suggested that as contained in his brief, dated October 17, 1986, the plaintiff's prayer for relief to the court that, in accordance with 42 USL 1981, namely the right to give evidence, "this case be remanded for the purpose of requiring the District Court to make adequate findings of fact and

conclusions of law, namely declarative and injunctive judgments which are of no monetary gain to the appellant" is, especially with regard to 42 USL 1983, a sufficient request for the constitutional redress of his personal injuries with which to provide him with constitutional standing and an Art. III Federal Court with constitutional jurisdiction so as to hear, at least, the merits of this case. Fortunately, however, there exists more specific and concrete, indeed monetary, "personal stakes" with which to argue as follows:

PERSONAL STAKES

First, though not foremost of all, the plaintiff still has a personal stake and "live" interest in the potential monetary relief from the outcome of continuing litigation in two Louisiana

State Courts: 1) Louisiana Supreme Court, 87-C-1284 upon a Writ of Certiorari-Brief (copy attached) filed on June 4, 1987, as a result of the Louisiana Court of Appeals, First Circuit's denial of the plaintiff/appellant's Request for Rehearing (copy attached) of its decision* (despite its own "manifest error") to affirm the Louisiana State Civil Service Commission's OPINION (of October 7, 1985) of the whistleblower/appellant's own State Civil Service Appeals (commenced as of March 23, 1982) and own investigation/prosecution of his own charges of wrongdoing within and between Louisiana's Department of State Civil Service (DCS) and Louisiana's Public Health Agency (DHHR-OHSEQ). There is

* Resubmitted to this Court

potential monetary relief in the form of adjustments in salary (and it follows retirement benefits) in the amount (of not less than $100 per month) depending upon what period of wrongful deprivation (11-78 or 11-82 to 8-84) is ultimately considered. Note: Any Federal Court ruling favorable to the plaintiff/ appellant would significantly contribute to the success of the above-mentioned consolidated State Civil Service appeals which were initially based on the following two State Civil Service Rules:

> Civil Service Rule 13.10(c): An appeal may be made to this Commission by:
>
> > Any person in the classified service who alleges that he has been deprived of any right, discriminated against, or adversely affected by the violation of any provision of the Article or any Rule of the Commission. (Underlines mine.)

Civil Service Rule 14.1(j)
Prohibited Activities:

> No person shall make any false statement, certificate, mark, rating, form or report with regard to any application, test, certification, personnel transaction, appointment, or employment made under any provisions of the Department of Civil Service, or in any manner commit or attempt to commit any fraud preventing the impartial execution of the Article Rules and Regulations. (Underlines mine.)

Thus, all Federal/State litigation is highly relevant.

Hence, for instance, if either or both the Federal Court and the Louisiana Supreme Court rule that the title change personnel mechanism as cleverly misused by Louisiana's State Civil Service is declared discriminatory/unconstitutional and/or that the white out/altering/injuring of a public document, namely the plaintiff/appellant's job

description is purely illegal for many, including criminals, reasons, then the above-mentioned relevant monetary relief is assured. (Please note: Since the Louisiana State Supreme Court's decision, whether favorable or not, is of utmost value, hopefully, the Federal Court will allow that court to decide first.)

2) A second very potential source of legal monetary relief for the plaintiff/appellant is his, again very relevant, lawsuit still pending, despite a court-ordered change of venue, at Louisiana's Orleans District Court, No. 86-1800-J (copy attached) against Mr. Robert Boland, the Chief Attorney for Louisiana's State Civil Service. This action, which had been commenced/ filed on October 3, 1986, some 14 days

before a brief was filed on October 17, 1986 at the U.S. Court of Appeals, Fifth Circuit, prays for declarative and injunctive relief as well as a whopping $401,328.88 judgment for monetary damages; indeed, for more money if the plaintiff/appellant's "psychological" pain and suffering continues until his lawsuit "leads to a correction of the wrongs (and) to a continued reformed and supervised (by the Federal Government or another adequate entity) Louisiana State Civil Service."

A PRECEDENT-SETTING ERROR OF EXCEPTIONAL PUBLIC IMPORTANCE:

Because, believe it or not, Mr. Boland failed to respond to the above-mentioned complaint (as he failed to respond to the brief of October 17, 1986, to the U.S. Court of Appeals,

Fifth Circuit), the perhaps soon-to-be-richer plaintiff/appellant will then with more credibility as to his primary motives in this litigation, demonstrate his foremost desired redress, as he continues his fight for the reform of our Civil Service/Merit Systems which are the backbone of modern government--a fight against a clear and present danger to the quality performance of government in Louisiana and perhaps elsewhere as spelled out in:

First, a newspaper article (Note: The attached copy* is offered for the very first time as information) from Baton Rouge, Louisiana's Morning Advocate dated February 6, 1985, which reflected an unsolicited newspaper man's on target perception of the crux of the

problem, namely the misuse, for the purposes of patronage, of the title change personnel mechanism to "grandfather" unqualified but favored persons into a higher classification, pay, and position of authority, which the plaintiff/appellant/whistleblower/investigator/prosecutor, obviously presented during his trial on February 5, 1985, before the Louisiana State Civil Service Commission--of which it was later discovered allegedly had one or more of its members as direct participants in the alleged governmental wrongdoing. Indeed, it was this testimony and discovery that led to the discovery of Louisiana State Civil Service's clever misuse of its title change personnel mechanism whereby it practices its unique discriminatory

favoritism by treating both the favored and the disfavored employee the same rather than differently (in the traditional way)--all of which led to Federal litigation.

The above-mentioned "clear and present danger" to government is, in Louisiana, namely State Civil Service's own subtle involvement, contrary to the Civil Service mission, in patronage for whatever reason. The plaintiff/appellant spelled out this danger in his Writ of Certiorari-Brief dated June 4, 1987, to the Louisiana Supreme Court, as per the following verbatim quotation:

> It has been widely, perhaps nationally, suspected that in many states, if not federal, Civil Service systems, favored but often otherwise unqualified/incompetent persons/employees are somehow

> uncompetitively but successfully promoted/appointed by simply being "grandfathered" or "blanketed" into positions with higher authority/classification/pay; no doubt leaving qualified honest and fairminded employees victimized, bewildered, unprotected, and along with the government, adversely affected. This still successful but highly blundered case involving the favored Ms. Sylvia Sterne and the disfavored appellant/applicant fits well into that mold with the words "TITLE CHANGED" supplanting "grandfathered" and "blanketed." But the seeds of reform may well be in the deliberately detailed records now before the courts of the State of Louisiana and the United States.
>
> (Page 16 of the Writ of Certiorari-Brief to the Louisiana Supreme Court.)

REASONS AGAINST PRIOR DISCLOSURE

It needs to be understood that the plaintiff/appellant, his associates, and other concerned persons heretofore have been (even now as then in February, 1982) reluctant to proclaim the above-cited danger to the public because of their uncomfortable position between those who wish to legislate, in Louisiana, the abolishment of our Civil Service/Merit System and those who worship our present system as though it were above and beyond error and wrongdoing. Indeed, a class action suit by other current/retired Louisiana classified State emloyees similarly adversely affected by the fraudulent title change personnel mechanism is quite likely if certain newspapermen and others no longer cooperate. Perhaps, if

desired by all, a quiet reform of Louisiana's State Civil Service, now that its wrongful ways are exposed, could be effected by court-sponsored negotiation and supervision, especially if the plaintiff/appellant and others cooperate with expeditionary concessions.

CLARIFICATIONS OF 42 USC 1983s VERY SPECIAL LEGAL BENEFITS:

It is suggested that the U.S. Court of Appeals, Fifth Circuit, like the District Court, has ignored the basic legal standings of this case, namely 42 USC 1981 and 1983, the latter of which has, because it relates to State governmental wrongdoing, special legal benefits which seem to have been tailor made for the plaintiff/appellant's case because, as per the quotations below

from Mr. Antineau's book (cited in the Brief of October 17, 1986), it provides him, in particular, with much easier access to the courts emphasizing equitable, indeed, even "hurt feelings," outrage, etc., over monetary injury/relief and judges with much more difficulty in their dismissal of cases and much, much more as noted:

> The right of access to the courts is protected by the Fifth and Fourteenth Amendments due process clauses and 1983 actions are available against persons acting under "color of law" who deny or infringe this right (p. 241). (Louisiana's Attorney General's Office should take note of this quote.)
>
> Action of State and local officers and employees is engaged in under "color of state law" if they are clothed with authority of the state and are purporting to act thereunder, even if the conduct is proscribed by state law (such as Louisiana Law

R.S. 13.5108.1 A, B, C, D, and E). (p. 104)

Section 1983 actions can be used to attack not only employment discrimination based on race, but also on any invidious discrimination (p. 326).

....in 1974, the Supreme Court held that the Eleventh Amendment bars actions against state officials for monetary damages when the awards will have to be paid out of a State treasury....some courts have allowed damages against state officials only in their individual capacities. The Eleventh Amendment does not bar federal court suits against state officers or agencies for declarative and injunctive relief (pp. 357-358).

Comment: Recovery for monetary damages in Louisiana under 1981 and 1983 has been made quite difficult by the Louisiana Attorney General's Office continued defense, in Federal litigation, of the defendants, presumably in compliance with Louisiana

law R.S. 13:5108.1 A, B, C, AND D, which in part reads:

> A. ...monetary damages arising...pursuant to the provisions of Sections 1981 through 1983 of Title 42 of the United Sttes Code by reason of alleged negligence or other act by an officer or employee, provided that such officer or employee at the time damages were sustained was acting in the discharge of his duties...and that such damages did not result from the intentional wrongful act or gross negligence of such officer or employee (as could be proven if the merits are heard in court).
> B. Within five days of the time the officer or employee is served...he shall deliver the...copy thereof to the attorney general. Upon such delivery, the attorney general shall assume control of the defense of such officer or employee, unless it shall appear that the officer or employee was acting outside of the scope of his employment. (Note: Mr. Boland chose not to deliver the copy and the Attorney General has apparently replaced him as the defense Counsel for the

Chairman of the Commission. Apparently, the Attorney General's investigation found nothing wrong--but no state provided attorney under equal protection of the law has attempted to find out if the plaintiff/appellant's charges are right.

C. Should an officer or employee of the state be held liable for monetary damages...the legislature shall appropriate a sum sufficient to reimburse the officer or employee.

Comment: For the plaintiff/appellant, this is a Catch-22 situation: The Federal Court requires redressible monetary damages in order to provide standing while even 42 USC 1983 makes monetary damages from federal litigation not redressible because in Louisiana, the State Treasury will pay. Possible answer: This court should consider redressible, under 42 USC 1983, equitable injury/relief, provide

constitutional standing, consider constitutional challenges and remand the case to District Court for hearing of the case's merits.

> Section 1983 applies only to persons acting under 'color of state or territorial law' and has no application to actions against the federal government, agencies, or persons acting under 'color of federal law.' (p. 178)

Comment: Ms. Horner, the Director of the Federal Office of Personnel Management is sued not on the basis of 42 USC 1983 but on the failure, perhaps because of Presidential Executive Order, to enforce Congressional intent/law to strengthen State Civil Service/Merit Systems so as to protect the employee's constitutional rights, etc., which, if violated, is a redressible non-economic, equitable injury.

In a 1983 action, the allegations of the complaint and the inference to be drawn therefrom, upon a motion to dismiss, must be taken most favorably to the plaintiffs. The Supreme Court has indicated that a motion to dismiss in a 1983 action is not to be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The rule is generally followed (p. 386).

In 1983, actions all necessary allegations pleaded must be proved by a preponderance of the evidence (p. 382).

There is no need to exhaust state judicial remedies before bringing a 1983 action in Federal Court (p. 393).

*Res judicata is never a barrier to 1983 action which is based even in part upon facts that were not in existence at the time of earlier litigation in either Federal or State Courts. (The plaintiff/appellant learned of the Louisiana State Civil Service Commission's participation in the alleged conspiracies after February 5,

1985--years after his initial appeal, on March 23, 1982, to the Commission.) (p. 399)

....A...commissioner has been subject to suit under this section. (p. 213)

A federal court has held that since a local Civil Service Commission was not competent to resolve claims...a hearing before such a commission was not res judicata when an action was brought in court under 1981. (p. 398)

Courts have recognized in many 1983 actions that a plaintiff, by introducing a sufficient quantum of evidence varying with the cause of action, can establish a prima facie case which will enable him to prevail unless the defendant then comes forward (which DCS Attorney Boland and others have not done) and establishes a persuasive defense. (p. 390)

A federal court, in certain extraordinary and limited circumstances, may postpone its decision in order to avoid premature and perhaps unnecessary decision of a serious federal question or to avoid the hazard of unsettling some delicate balance in the

area of state-federal relations. (p. 392)

A person has a right to be free from arbitrary denial of an opportunity to qualify for a public post. (p. 316)

If a public employee has either a 'property' or 'liberty' interest in his job (as Judge Livaudais has ruled), he is constitutionally entitled to (substantive) and procedural due process....A public employee's liberty is affected where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him. (p. 319)

Public employees with either a property or liberty interest at stake can utilize 1983 actions when being subjected to suspensions, layoffs, demotions, or other discipline short of removal, without procedural due process of law owing to them under the Fourteenth Amendment. (p. 321)

It is proper for a person adversely affected to bring an action under 42 USC 1983 on the grounds that he has been denied his rights under the

> equal protection clause of the Constitution. Any form of invidious or unconstitutional discrimination against the plaintiff or his class by a defendant action under 'color of law' can be attacked in a 1983 action. (p. 324)

In the case of United States ex rel Motley v. Rundle (1972, ED Pa) 340F Supp.807, 810-811, Mr. Antineau noted that "....regardless of whether actual damages have been proved." A federal court states:

> Whether or not actual compensatory damage is present, a plaintiff in an action under 42 USC 1983 may also recover nominal damages because the constitutional rights of a citizen are so valuable to him that an injury is presumed to flow from the deprivation itself. In most cases when a public official denies rights that the citizen felt secure under our Constitution, the result is hurt feelings, outrage, embarrassment, or humiliation and nominal damages may be awarded for those natural consequences of lawless action by state officials. (p. 353)

Comment: Apparently under 42 USC 1983, even "psychological consequence presumably provided by observation of conduct with which one disagrees" IS "a sufficient personal injury for constitutional standing purposes."

> The mootness doctrine does not prevent a 1983 action for the constitutional impairment of a federal right, even though that impairment has ceased, when collateral disadvantages can flow from the denial of the civil right. (pp. 412-413)
>
> Conspiracy claims...can be brought under 1983, so long as at least one of the conspirators has acted under 'color of law.' (p. 95)

ARGUMENTS/CONCLUSIONS

It may be argued/concluded from the above that:

A. The six substantive constitutional challenges present, alongside of the case itself, justiciable constitutional controversies for a Federal Art. III Court.

B. The plaintiff/appellant has constitutional standing and is therefore a legally proper person to sue for/to request constitutionally redressible relief, both equitable and monetary, because he has presented far more than sufficient constitutionally redressible, "cognizable," as well as "distinct and palpable" personal injuries causally and directly connected, as per a "quantum" of specific evidence dually reflecting both preponderance and malicious

intent,* to fully clothed with "color of law" Louisiana State officials/ employee's wrongdoing, which if not corrected would establish a dangerous "precedent-setting error of exceptional public importance"; the plaintiff/ appellant has vigorously commenced and persistently requested/pursued, for years, constitutionally redressible relief in which he continues to have a personal stake and certainly "live" interest (like the Orr v. Orr case) in the outcome of current relevant litigation in two Louisiana State Courts which will consider not only the constitutionality/legality of certain state governmental conduct, but also

* As a direct victim of malicious abuse of due process to accomplish unlawful purposes.

requests for monetary relief as follows:

a) For monetary damages in the form of loss of property, namely salaried (and retirement) income--which is more of a legal status than had Mr. Orr in the Orr v. Orr case in which his nationally important constitutional challenge in Federal Court may possibly have provided his (and the plaintiff/appellant's) "only promise" for relief (440 USC 273).

b) For, and foremost, equitable relief from such injuries as, in part, "invidious discrimination," violation of laws and State Civil Service rules in order to cover up conspiracies (which hardly contribute to constitutional due process), denial of various constitutionally and legally protectible rights and adversely

affected professional and State Civil Service careers and his otherwise acclaimed reputation as a Chief Public Health Planner (a fact to this day still denied despite a preponderance of evidence), as well as the specific illegal denial, since November 1978 (which began to whole pursuit of equitable justice and monetary adjustment) of an opportunity to qualify/compete for the still abandoned "public post" variously identified as: DHHR-OHSEQ's Community Planning Program Coordinator, position #1155-001/Planning Analyst VI/Director of DHHR-OHSEQ's Policy, Planning and Evaluation section.

The seemingly endless list of inequities would also include still successful victimization of the

plaintiff/appellant in favor of another employee by means of blatant conspiracies, collusion, fraud, falsification and concealment, unlawful injury of official public records and outright perjury. (This list could to on and on..but the bottom line is that the Federal Office of Personnel Management's ruling calling for the State Civil Service's "self-certification" or self-regulation failed to enforce congressional intent-legislation to protect this former employee in a State Civil Service.

Finally, towards constitutional redressible relief, the Art. III Federal Court(s) must address and abide by the special legal benefits afforded by 42 USC 1983 with respect, at least, to access to a Federal Court, dismissal of

claims, res judicata, even "psychological" injury. The court, in particular, should consider that an offer by the State to pay monetary damages makes that relief hardly redressible in this case unless it were for a more fantastic, unpayable amount than four million dollars. Nonetheless, since Federal litigation is still alive, I hereby, if legally possible, reclaim one (1) dollar or more monetary damages in this Federal litigation plus equitable relief.

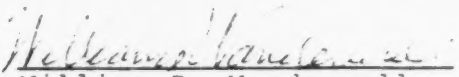
C. The ARt. III Federal Court(s) because of the above outlined justifications, are therefore rightfully and legally empowered with U.S. Constitutional jurisdiction to consider, decide, and so resolve the already-presented six substantive

constitutional challenges, any one of which just might cause success in state litigation, as well as impact the quality of governmental performance not only in Louisiana but also throughout this nation.

Therefore, it is again prayed that the U.S. Court of Appeals, Fifth Circuit, rule on the constitutional questions and remand the case to the District Court so that the plaintiff/appellant may (this time in a necessarily less defensive setting than when he prosecuted before the Louisiana State Civil Service Commission) obtain answers to important questions--or stay all its proceedings until state litigation is finalized. During this stay, it was suggested that the Court through the appointment of a (perhaps

volunteer) Special Master could quietly test the merit of Louisiana's State Civil Service Self Regulation with the premise that self reform could be the better part of it.

Respectfully,



William R. Vanderwall
6645 West End Blvd.
New Orleans, LA 70124
(504) 486-4672

I hereby certify that on this 22nd day of July, 1987, a copy of this Petition for Panel Rehearing and attachments have been sent via U.S. Mail with proper postage to the correct addresses of the parties noted on the top page of this Petition.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86 3617

WILLIAM R. VANDERWALL
Plaintiff-Appellant,

versus

CONSTANCE HORNER, ET AL.,
Defendants-Appellees.

Appeal from the United States District
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(August 10, 1987)

Before REAVLEY, JOHNSON AND DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby

"Denied"

ENTERED FOR THE COURT:

United States Circuit Judge

APPENDIX F

STATE OF LOUISIANA
DEPARTMENT OF CIVIL SERVICE
BATON ROUGE, LOUISIANA

AUTHORIZATION TO MAKE
CHANGE IN CLASSIFICATION
AND/OR PAY PLAN PENDING
FINAL APPROVAL BY THE
CIVIL SERVICE COMMISSION

"4-7-81"
EFFECTIVE DATE

CLASS TITLE: Community Planning Program Coordinator

CLASS CODE: 1155

SALARY RANGE: $1542 - 2209

TENTATIVE APPROVAL REQUESTED

APPROVED "Hamner"
DIRECTOR

"8-1-80"
DATE

RECOMMENDED:

"Frank V. Reitzel"
CHIEF OF CLASSIFICATION

"8-1-80"
Date

APPENDIX F